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# ONTARIO LABOUR RELATIONS BOARD REPORTS

July 1990





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# **ONTARIO LABOUR RELATIONS BOARD REPORTS**

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1990] OLRB REP. JULY**

**EDITOR: PERCIVAL S.C. TOOP**

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.



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**2996-88-OH Judy Barry, Complainant v. Bilt-Rite Upholstering Co. Ltd., Respondent**

**Discharge - Health and Safety - Remedies - Occupational health nurse fired after refusing to return to the employer the keys to the filing cabinet holding employee health records - Whether discharge was for insubordination or acting in compliance with OHSA in protecting the confidentiality of employee health records - Nurse found to be genuinely motivated by a health and safety concern - Board not making positive finding that there is a duty under OHSA with which nurse was complying - Board finding it appropriate to review penalty imposed whether OHSA violated or not - All record of discharge to be removed from file - Written warning substituted for discharge**

**BEFORE:** K. G. O'Neil, Vice-Chair, and Board Members J. A. Rundle and P. V. Grasso.

**APPEARANCES:** David G. Leitch and Judy Barry for the complainant; Marilyn Silverman, Alex Mercer and Martin Ryan for the respondent.

**DECISION OF K. G. O'NEIL, VICE-CHAIR AND BOARD MEMBER P. V. GRASSO;** July 17, 1990

1. This is a complaint that an occupational health nurse was fired contrary to section 24 of the *Occupational Health and Safety Act* because she acted in compliance with that Act.
2. Mr. Barry worked for the respondent from March 1987 until her February 1989 discharge. Ms. Barry asserts that the reason she was fired was that she was acting in compliance with the *Occupational Health and Safety Act* (sometimes referred to below as OHSA) in protecting the confidentiality of employee health records. The employer responds that the discharge had nothing to do with the *Occupational Health and Safety Act*, but was for insubordination in refusing to return the employer's property, i.e. the keys to the filing cabinet holding the employees' health records, and in using abusive language to her supervisor.
3. At the outset of the hearing the employer moved for a dismissal of the complaint on the basis that the complainant had not made out a *prima facie* case of a violation of the Act. It asserted that the complaint essentially alleged a violation of section 34(1)(d) and that violations of that section were not within this Board's jurisdiction. Reference was made to the Board's unreported decision in *Ontario Hydro*, dated January 12, 1989, Board File No. 1950-88-OH. It was argued that section 24 did not cover the complainant's problem and therefore we should exercise our discretion under section 24(3) to not hear the complaint. The second reason for this request was the employer's allegation that there were no monetary damages and therefore no remedy available. Although the complainant also asked for non-pecuniary damages for mental anguish and prejudice to future employment opportunities, it was argued that is not the Board's practice to grant such damages. The Board ruled that it would hear the complaint as it was of the view that it was necessary to hear the evidence to determine whether a complaint could be made out. The case cited in support of the motion is distinguishable because, among other reasons, it involved an allegation of a violation of section 34(1)(d) rather than that the complainant was dismissed contrary to section 24, because she was acting in compliance with section 34(1)(d), as is the case before us.

The Facts

4. It was part of Ms. Barry's duties as an occupational and safety nurse to maintain pre-existing employee health files and set up new ones. She regularly received doctors' notes and sickness forms during the course of her duties. She dealt with pre-employment physicals, emergency first

aid, workers' compensation and insurance matters. In addition, she did counselling and supervised audiometric testing. If management employees requested information, Ms. Barry would prepare updates on the employees' status based on the material in the files. She estimated that during the course of her employment she dealt with approximately 40 percent of the employee health files.

5. On January 24, 1989, a work stoppage involving a bargaining unit of over 400 employees occurred at the respondent's upholstery plant. Ms. Barry was not part of the bargaining unit but was laid-off on February 6, 1988 as a result of the labour dispute. A day or two later Ms. Barry called her supervisor, Ms. Baxter, Manager of Human Resources, to inquire about her final pay. Ms. Baxter advised her to turn over the company's keys so that the company could have access to the files in the health unit. There were two sets of keys in Ms. Barry's possession, one to cabinets in the company doctor's office and one to the cabinets in the nurse's office. The request to return the keys was not specific as to which set was required. The company maintains that the reason the keys were needed was that employees off sick during the labour dispute were still submitting claim forms for their sickness and accident benefits. In order to have benefits continued the procedure was for the employer to return the forms after indicating on them that the employee was still in the employ and that there already had been a claim established.

6. Ms. Barry, in response to the request to return the keys, indicated her concern about confidentiality and said she would get back to Ms. Baxter. Ms. Barry then called the Occupational Health and Safety Branch of the Ministry of Labour and spoke to Dr. Frith, a medical consultant, who suggested she give the keys to the company doctor, which she did within the next few hours. She had a precedent for this from a previous job in which she found herself in a similar position during a labour dispute. She had consulted the Ministry of Labour after being laid off from the earlier position and was advised to give the keys to the health unit to the employer's Medical Director, which she did.

7. A further day or two later, Ms. Barry called Ms. Baxter again to confirm whether her money would be available to pick up from the security guard at the picket line. Ms. Baxter advised Ms. Barry to leave the keys at the same time as she picked up her check. Ms. Barry informed her that the keys were with Dr. Mansfield. Ms. Baxter responded that she had no right to do that, that if she turned them over to the company she would then be absolved of all responsibility, including abuse of the information. Ms. Baxter said the company would be taking on this responsibility since Ms. Barry would not be at the workplace any longer. Ms. Baxter put it that Ms. Barry had a professional responsibility to return the keys. Ms. Barry disagreed. The conversation ended when Ms. Barry told Ms. Baxter to "Fuck-off, you bitch", and hung up. Ms. Barry did not mention the *Occupational Health and Safety Act* by name in this or her earlier conversation with Ms. Baxter although she did mention her professional responsibility concerning confidentiality.

8. When Ms. Baxter informed her superior, Mr. Mercer, of this conversation, he advised Ms. Baxter to contact the people Ms. Barry had consulted to see what the grounds for the refusal would be as this was now "a different scenario". Ms. Baxter proceeded to contact the Employment Standards Branch, the College of Nurses and the Ministry of Labour. The advice she received in this round of calls ranged from the opinion that the matter was gross insubordination rather than a matter of confidentiality, to the idea that a nurse might feel she had to turn the keys over to a professional peer because of the nurse-client relationship. The latter was a new concept to Ms. Baxter. At the Ministry of Labour's Occupational Health and Safety Branch, she spoke to Arlene Frehs, a consultant with that branch who confirmed the information about the nurse-client relationship.

9. Mr. Mercer then telephoned Dr. Mansfield. Since Dr. Mansfield raised concerns himself about returning the keys, Mr. Mercer checked with the College of Physicians and Surgeons.

Dr. Mansfield made it clear in his evidence that he considered it Ms. Barry's duty to keep both the doctor's and the nurse's records, both of which he considered to be of the "strictest confidentiality". He acknowledged that there were times when he would release information from the files to the employer, but indicated that the control was in himself as a medical professional. He stressed that the files were not his or the employer's records but the employees' records. He was very reluctant to give over the keys at all, but when the labour dispute became protracted and the College of Physicians and Surgeons told him that he would be able to turn over the keys, he did so. He would have preferred to hand them over to another medical professional who would be in charge of the files.

10. Arlene Frehs, the Ministry of Labour consultant to whom Ms. Baxter spoke after Ms. Barry had returned the keys to Dr. Mansfield, testified that she felt that the material in the employee health files, as she understood it, would have been confidential. She considers a medical record to be any notation by a health care provider about a patient or information about that patient's condition given to that provider. She recalled that Ms. Baxter was in personnel and said, "I believe she wanted access and I was explaining why management should not have access."

11. Mr. Mercer testified that Ms. Barry was fired because of her work performance. The letter of termination reads as follows:

Several conversations have taken place between you and your superior Ms. Baxter regarding your returning the keys to your office while you are on lay off. You were evasive and indicated you did not wish to return them due to the possible confidentiality aspect of the medical unit. You were told we required access to finalize employee claims and/or inquiries.

Ms. Baxter made it clear to you that we wanted and indeed required the keys.

On the ninth (9th) of February 1989 you called to inquire about your final monies and spoke to Ms. Baxter (who was in my office at the time of the conversation). She advised you that steps would be made to ensure any monies owing you would be available for you to pick up and she told you to bring the office keys and/or other Company property in your possession needed to run or maintain the health unit. You said that you, on third party advice had given the keys to Doctor Mansfield contrary to my instructions through Ms. Baxter. You also argued with Ms. Baxter and engaged in foul and abusive language toward Ms. Baxter who is your superior. You should also be aware that we have investigated your claim through the Ministry of Labour Occupational Health branch and also the College of Nurses for the Province of Ontario and although you may have felt bound while at work with the ethical nurse/client relationship you were absolved from such a responsibility while not employed. In short, once you gave the keys to the Company, the Company assumed such a responsibility.

Based on your non-cooperative attitude and your refusal to follow instructions and your abusive language to your superior your employment is being terminated effective immediately.

Please return any and all Company property and all monies owing you will be sent to you as expeditiously as possible.

Mr. Mercer considered Ms. Barry to have been uncooperative during this incident and on previous occasions. He viewed the refusal to give back the keys and the conversation with her supervisor as insubordinate and unprofessional. In his words, "there was no need for it to go that far." In sum, he felt that there was no positive balance to outweigh the incident, although Ms. Barry had no disciplinary record.

12. Part of the background to this dispute relates to the hierarchy of control of substances used in the workplace depending on how, if at all, they are dealt with by regulation under the *Occupational Health and Safety Act*. There is a general duty on employers and supervisors in section 14(1) of OHSA to take every precaution reasonable in the circumstances for the protection of



a worker and on a worker in section 17(2) to work in a way that does not endanger himself or other workers. There are more specific duties throughout the OHSA for all concerned where further control is prescribed by the regulations. Substances controlled by regulation 654/86 are referred to below as "controlled substances" and those with a specific regulation of their own pursuant to the power in section 41(2)(14), such as lead (Reg. 536/81), as "designated substances".

13. At the time of the events outlined above noise was the subject of proposed regulation as a designated substance. The draft of a proposed regulation entered into evidence bore the date July 7, 1986, over a year and half prior to Ms. Barry's lay-off. However, it has not yet been made law. Ms. Barry estimated that it had been proposed for five years in 1988. The employer did not dispute that it was likely for this regulation to be relevant to the employer's plant if ever given the force of law. Even without this regulation, the employer had engaged in some audiometric testing of employees. Pertinent sections of that proposed regulation provided for medical monitoring, the records of which were to be kept in a secure place by the physician who conducted the examination. Provisions for disclosure of the results to the employer (s. 17) are framed only in terms of advice as to whether the worker involved is fit for work in noise exposure or not, or with what limitations.

14. Mr. Mercer had never heard of any test being taken under the *Occupational Health and Safety Act* in the employer's workplace, the records of which could be in the files. In general, he considered the records under Ms. Barry's control in the health unit to be analogous to personnel records and was reinforced in this view by the fact that Ms. Barry never made an issue of confidentiality to his or Ms. Baxter's knowledge. The company makes a distinction between outside doctors' return to work slips which it does not consider confidential and records of examinations by the company doctor, which it does.

15. Ms. Baxter felt Ms. Barry's respect for confidentiality was suspect because of the fact that on a number of occasions she had overheard Ms. Barry discussing what Ms. Baxter considered to be confidential information in a loud voice. Ms. Baxter also said that in Ms. Barry's absence she would use the files in the health unit for such purposes as review of medical information concerning the duration of absence. She says the medical cabinets were unlocked, although the health unit and desk were locked. An employee of the respondent who performed hearing testing had access to the files to put records of the hearing tests in the files as well. Ms. Barry also had help from non-medical personnel to clear up a filing back-log and there were files from former employees under the bed in the health unit which were freely accessible. Further, there were notations from others on her supposedly confidential nurses' notes.

16. Ms. Barry's response to the above concerns is that she used her judgement as to what could be disclosed. While she acknowledged that she carried on certain conversations in front of other people, for instance as to whether a medical return to work slip was adequate, she maintained that she did not disclose any information that was actually confidential. She emphasized that when some employees handed in their disability insurance forms to people other than a health professional that fact indicated their choice to disclose that information to the employer. She considered similar information confidential when given to her directly. She maintains that she locked the files and drawers and the health unit door when she left the health unit each time. This was corroborated for a short period of time by Ms. Schneider who helped her do filing just prior to the lay-off.

17. Ms. Barry's concern was partly that she would be prosecuted under either the *Health Disciplines Act* or the *Occupational Health and Safety Act* if she breached confidentiality. This was

based largely on the fact that she did not know exactly what was in the files and felt that there might be information that she was precluded from disclosing.

18. There are provisions with respect to confidentiality binding doctors and nurses under the *Health Disciplines Act*. Reg. 448, R.R.O. 1980, section 22, defines professional misconduct for a doctor to include:

22. Giving information concerning a patient's condition or any professional services performed for a patient to any person other than the patient without the consent of the patient unless required to do so by law;

For nurses the parallel definition is R.R.O. 1980, Reg. 449, section 21, which provides in part:

21. For the purposes of Part IV of the Act, "professional misconduct" means,

...

(k) Failure to exercise discretion in respect of the disclosure of confidential information about a patient;

...

(m) conduct or an act relevant to the performance of nursing services that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. O. Reg. 578/75, s.21.

19. Despite the fact that Ms. Barry did not know if the noise regulation had been proclaimed in law, and therefore whether noise was yet a designated substance, she was of the view that the medical files should be kept in compliance with the OHSA, as if it had been law. Furthermore, she had seen "all kinds of things spread around" in the plant and did not know whether they were designated substances.

20. Norman Carriere is the health and safety coordinator for District 6 of the United Steelworkers of America which represents a bargaining unit in the respondent's plant. Mr. Carriere's evidence established that there were Material Safety Data Sheets ("MSDS") for two designated substances, trichloroethane and lead styphnate, and many controlled substances, posted in the respondent's plant. Mr. Mercer testified in reply that the two designated substances were rarely used.

### Argument

21. The respondent argues that neither the complainant nor the respondent were motivated in any way by reliance on the OHSA or in reprisal for anything to do with the OHSA, that this is a wrongful dismissal case in the wrong forum. It submits that there is no *prima facie* case of a violation of the OHSA, either in a technical sense or when viewed from the policy perspective of the purpose behind the legislation.

22. Specifically, the respondent argues that Ms. Barry was not acting in compliance with the OHSA. Counsel referred to *Ministry of Community and Social Services re. Douglas Lloyd*, [1988] OLRB Rep. Jan. 50 at paragraph 18. Counsel put it that the highest it can be put is that Ms. Barry thought there might have been something to protect in the files. There was no evidence that any of the things that were in the files were in the nature of an exam, test or X-ray taken in accordance with the Act. The existence of controlled or designated substances in the workplace is said not to be enough; it is too tenuous a connection to bring the case within the ambit of section 34(1)(d).

Similarly, she argues that one cannot be acting in compliance with the proposed noise regulation since it is not yet law.

23. Secondly, counsel argues that under section 24, in order to establish a violation, the dismissal had to be *because* she was acting in compliance; Baxter and Mercer had to know she was acting in accordance with the OHSA and have that as part of their motivation. It is submitted that this was not the case.

24. The respondent asserts that the complainant used the convenient excuse of the Act to justify her conduct in retrospect, that she was motivated by anger at her lay-off rather than by OHSA considerations. Employer counsel points to the evidence set out in paragraph 15 above to show that there was no occupational health and safety concern until after the discharge.

25. Counsel submitted that the intent of section 34(1)(d) is to prevent improper disclosure to third parties other than the employer. Counsel compares section 34(1)(d) to the regulations under the OHSA (both the existent lead regulations (O.R. 536/81, s.76(1)) and the proposed noise regulations (see proposed section 17(4)). Unlike the designated substance regulations, it does not provide specific prohibitions against disclosure by the employer.

26. Counsel for the complainant argued that Ms. Barry knew at the time of her lay-off that there were restrictions on access to medical records generated under the *Occupational Health and Safety Act*. She knew of section 34 and the controlled and designated substance regulations. Secondly, she knew about the audiometric testing of workers already done at the respondent's workplace and that there was a proposed regulation governing noise which would require audiometric testing. Thirdly, she had been told by the doctor at the Ministry of Labour who was responsible for enforcing the OHSA that she should not return the keys to the employer directly, but to its medical director.

27. Counsel submits that Ms. Barry did not know what medical information was in the cabinet, apart from that which she either put there herself or had reason to retrieve. She did not know whether or not medical tests, exams or X-rays under the Act had been ordered prior to her employment in March 1987. She had a reasonable concern about protecting confidentiality, an important concept under the OHSA, and should therefore be found to have been acting in compliance. He argues that the standard of correctness in *Ministry of Community and Social Services, supra*, is overly restrictive in requiring that the employee be correct as to her duty under the OHSA in order to be found to be acting in compliance.

28. The evidence of the numerous hazardous substances of the type for which tests may have been ordered under the OHSA, counsel submits, underscores the fact that her concerns were appropriate. More importantly, he argues, the evidence challenges Mr. Mercer's credibility. On cross-examination he would only admit the existence of one controlled substance. Counsel submits that he is unlikely to know if anyone tried to assess the hazards he did not know existed.

29. Counsel underlines the point that Ms. Baxter spoke to Arlene Frehs of the Ministry of Labour *before* the decision to discharge. Frehs' uncontradicted evidence was that she explained that there were confidentiality requirements under the *Occupational Health and Safety Act*. Counsel submits that this counters the employer's submission that the OHSA was not in its mind when the decision to discharge was made.

30. Counsel argues that *Firestone Canada Inc.*, [1985] OLRB Rep. July 1044 establishes the proposition that bad faith is not required. The fact that the disciplinary response was prompted by an act authorized by the statute is enough. He refers to *Black & MacDonald Ltd.*, [1983] OLRB



Rep. Dec. 1971 for the proposition that the "taint" theory applies to cases under the *Occupational Health and Safety Act*. He refers to *Commonwealth Construction Co.*, [1987] OLRB Rep. July 961 to argue that the Board can substitute a penalty even if it is found that she was not acting in compliance with the Act, if it thinks the penalty was excessive. In other words, the Board does not need to find a section 24(1) violation to apply section 24(7).

31. Counsel refers to the case of *R. v. Cancoil Formal Corporation and Parkinson*, O.A.C. 225 (C.A.) by way of analogy. This case dealt with officially induced error as a defence in a criminal prosecution under the *Occupational Health and Safety Act*, where an accused reasonably relied on an erroneous legal opinion of an official responsible for the administration or enforcement of a law. Ms. Barry went to what she thought was the official source as to the law, the Ministry of Labour. She got a direction about what to do. To her, confidentiality was one indivisible concept. She did not break it down with Dr. Frith as to categories of confidentiality, whether her responsibility under the standards of practice under *The Health Disciplines Act* as a nurse, or under the *Occupational Health and Safety Act*. Counsel argues that she is entitled to rely on the idea that Dr. Frith has in mind the requirements of the statute since it is his job to explain and enforce the legislation.

32. Counsel referred to a decision of the Director of the Occupational Health and Safety Branch under section 32 of the Act in *General Motors of Canada Ltd.*, an appeal of order No. 0197EA, decision dated March 15, 1984, which upheld an order prohibiting a company doctor from disclosing blood-lead test results taken under the lead regulation to the company's industrial hygienist based on section 34(1)(d). The decision draws a distinction between non-health and health personnel, the latter category including registered nurses, but not industrial hygienists. Disclosure was held to be permissible to health personnel (including their clerical help), but not to non-health personnel.

33. Counsel included an excerpt from the report of the Commission of Inquiry into the confidentiality of health information, under Commissioner Krever (the "Krever Commission"). At page 276 the report states that employees but not employers should have access to employee health records. Counsel suggested that recommendation 159(1), which Commissioner Krever described as not conflicting with the OHSA, incorporates an interpretation which is appropriate for section 34(1)(d). This recommendation is as follows:

That the Joint Health and Safety Committee or Health and Safety Representative may not disclose information concerning the health of an employee to the employer or to other employees without the consent of the worker to whom the information relates.

Counsel argues that the essential point is that the employer's position on access to health records is not supportable. It is not a question of ownership. Counsel refers to page 168 of the Krever report as follows:

The obligation of confidentiality is not confined to the health professional employee of an employer.... A similar duty exists for any person who is responsible for the storage and handling of employees' health information obtained or collected by those employees providing a health-related service to other employees.

A view often expressed is that ownership of records entitles the owner to control over and access to them. Some employers pay lip service to the concept of confidentiality but insist on retaining a key to the cabinets in which the health information is kept, "in case of fire". Other employers refuse to allow nurses to keep health information in locked cabinets....

34. As to remedy, counsel refers to *Jacmorr Manufacturing Ltd.*, OLRB Rep. [1987] Aug. 1086 for the proposition that we have jurisdiction to grant damages for mental distress, although

the Board declined to award them on the facts of that case. He further refers to *Slaight Communications Incorporated v. Ron Davidson*, [1989] 1 S.C.R. 1038, for the proposition that the Supreme Court of Canada has authorized remedies which make some attempt to stop the damage to reputation which follows on an unjust dismissal. Counsel further submitted excerpts from texts on wrongful dismissal and labour arbitration to support his submission that although the complainant's language was serious, it was provoked by Ms. Baxter's lack of knowledge about a nurse's duty about confidentiality, was isolated as well as private, and should not therefore warrant dismissal.

### Conclusions

35. The Board must determine whether Ms. Barry's discharge should be allowed to stand under section 24 of the OHSA. The complainant characterizes her actions as acting in compliance with the Act, specifically section 34(1)(d) and the employer's response as prohibited by section 24.

36. The most centrally relevant sections of the OHSA are sections 24 and 34(1)(d) which provide as follows:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply, with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

• • •

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

...

34.-(1) Except for the purposes of this Act and the regulations or as required by law,

...

- (d) no person shall disclose any information obtained in any medical examination, test or x-ray of a worker made or taken under this Act except in a form calculated to prevent the information from being identified with a particular person or case.

37. The employer's argument is not only that the behaviour does not technically fit within section 34(1)(d), but that the complainant is guilty of bad faith - that the motivation for Ms. Barry's actions concerning the keys was anger and not professional responsibility. Although it is unlikely that Ms. Barry was (or that anyone in a similar position would be) grateful to be without remunerative employment during the lay-off, we do not accept that this had eclipsed her genuine concern for her professional responsibility under the OHSA in the matter. The fact that she consulted the Occupational Health and Safety Branch of the Ministry of Labour, based on her previous experience in a similar situation, and the fact that she returned the keys promptly to Dr. Mansfield counter the suggestion that Ms. Barry was simply "making trouble". The delay caused by Dr. Mansfield's own concerns about turning over the keys cannot be attributed to Ms. Barry. The evidence, taken as a whole, indicates that although Ms. Barry lost her temper with Ms. Baxter on the phone, she was genuinely motivated in the first instance by a concern for her duty as an occupational health and safety nurse.

38. The majority of cases decided to date by the Board under section 24 of the OHSA have dealt with refusals to work under section 23 of the Act. The cases claiming protection for activity not characterized as refusal to work under section 23 of the OHSA, but acting in compliance with some other section of the OHSA are fewer.

39. In *Imperial Oil*, [1982] OLRB Rep. April 580, an employee whose duty was to issue safety certificates under the confined space regulation under the Act refused to issue one because he thought a space was unsafe. The company maintained there was no hazard and disciplined him for not issuing the certificate. The Board considered the matter in the framework of acting in compliance with his duties under section 72 of the industrial regulations under the OHSA which deal with confined space. The Board decided that he had an honest health and safety motive throughout and that while he might have been over-cautious and wrong, he did have some reason to believe that the situation could pose a hazard to the workers who would be in the space. At paragraph 25 the Board said as follows:

... in our view, it is inconceivable that the Legislature could ever have intended that a person in Mr. Frangis' position could be disciplined for an honest and bona fide exercise of his responsibilities under section 72 of the Regulation. As the "competent person" designated to satisfy himself and certify to the safety of the workplace, it would be anomalous [sic] if the raising of a bona fide safety concern could result in discipline - *even if he is wrong in his assessment of the situation*. On the contrary, it is our view that such concerns should be raised and resolved with his employer. This does not mean that Mr. Frangis' has a licence for insubordination. If his refusal were frivolous, vexatious or improperly motivated, the Act would not protect him, an in appropriate circumstances, a prolonged debate might well raise a doubt about an employee's motives. Nor does it mean that the designated individual is the last word on safety at the work site. Another competent person could certify the safety of the situation (as could have happened here) and the lack of foundation for a refusal to issue a permit or the inability to comprehend or accept the advice of more experienced persons might well raise doubts as to the individual's competence and could be dealt with accordingly. *But in our view, Mr. jH jMFrangis was seeking compliance with the Act, and on the evidence his position cannot be characterized as frivolous.*



A disciplinary response from his employer - and this is how Mr. Lingley characterized it - was uncalled for.

[emphasis added]

A major difference between that case and the one before us is that no one argued in *Imperial Oil* that the complainant was wrong as to whether he had any duty under the OHSA, which is the thrust of the employer's argument before us.

40. In *Butler Metal Products*, [1988] OLRB Rep. Oct. 1003, a robotics supervisor was disciplined for leaving the workplace rather than obey an order to supervise work that he thought was unsafe. The Board found that this was not acting in compliance with the OHSA because the procedure was safe, i.e., he had been wrong in his assessment of the situation. Nonetheless, the Board found that his actions did constitute seeking enforcement of the Act and therefore a violation of section 24 was made out. At paragraph 29 the Board said as follows:

... Although we have determined that Heath's [the complainant] actions were not in compliance with the Act or the Regulations, we are satisfied that his conduct during the week in question was motivated by genuine safety concerns. In determining that the work on the gates while production was running was unsafe, Heath was acting in good faith. He raised his safety concern with his superiors and it was because of this concern that he refused to give his permission for the work to proceed.... By refusing to give his permission to work on the gates, Heath's objective was the enforcement of the OHSA.

This is essentially the same approach as in *Ministry of Community and Social Services*, *supra*, using a test of correctness for "acting in compliance" but not for "seeking enforcement". In paragraph 19 the Board underlined that an employer cannot legally discipline a worker who is seeking enforcement of the Act, even if the concern of the worker is not found ultimately to be a contravention of the Act. Conduct which seeks enforcement of the Act is protected activity in order to encourage workers to raise health and safety concerns with their employer in order to reduce the likelihood of injury in the workplace. (See *Commonwealth Construction Co.*, [1987] OLRB Rep. July 961.)

41. Ms. Barry relies on the provisions of section 34(1)(d) to support her claim that she was acting in compliance with the OHSA. The evidence was sufficient to raise the possibility that the health records in the workplace included information covered by section 34(1)(d). It cannot be put higher than that, nor was it argued to be higher than that. There are numerous controlled and at least two designated substances present in the workplace and therefore the prescription as to medical monitoring in the relevant legislation could have resulted in such information being in those health records. The employer argues that if there were no records collected under the OHSA, there could be no duty under the OHSA with which she could have been acting in compliance.

42. Ms. Barry was taking an approach to section 34(1)(d) which can be described as "better safe than sorry". Because she could not be sure that there were no records taken under the OHSA in the cabinets, she took the cautious route. She knew that the only way she had to ensure that records were not irretrievably disclosed in an improper manner was to take precautions with the keys. We find that this was a genuine effort on Ms. Barry's part to comply with the OHSA. Further, it is consistent with the objectives of section 34(1)(d). The section is grounded in an attempt to balance the need for the various forms of collection of information necessary to the scheme of the Act, including medical monitoring, with the competing need for respect for various kinds of privacy, confidentiality and property in information.

43. Although the employer maintains that any duty under section 34(1)(d) did not extend to prohibit disclosure to it, it did not dispute that Ms. Barry would have had a duty under section 34

(1)(d) as custodian of the health records if any documents protected under that section had been in the files. It may be that Ms. Barry was seeking the enforcement of the OHSA by trying to prevent improper disclosure under the section in phoning the Ministry of Labour to ascertain what her duty was. However, argument was not specifically addressed to this characterization of her actions, but was based on the notion that she was acting in compliance with the OHSA. (The issue of whether or not she was acting in compliance with her duties under the *Health Disciplines Act* is not for us to decide.) In the view we ultimately take of the matter, it is unnecessary to address whether Ms. Barry's activities should technically be characterized as "acting in compliance" or "seeking enforcement", or to address Mr. Leitch's argument that the standard of correctness for "acting in compliance" is incorrect. Given our view of section 24 (7), set out below, the result in this case would be the same, and it is therefore unnecessary to make a finding in this regard. In the result, it is also unnecessary to determine the scope of section 34(1)(d) in regards to disclosure to the employer as opposed to disclosure to outsiders.

44. Section 24(7) is a specific addition to the already wide discretion of the Board under its remedial power under section 89(4), which is imported into the OHSA for purposes of complaints under section 24. It has been referred to in a variety of circumstances in the existing Board jurisprudence. For instance, in *Ministry of Community & Social Services, supra*, at paragraphs 26 and 27, after finding no violation of the OHSA because of the provisions of the OHSA relating to correctional officers, the Board commented as follows:

This subsection [24(7)] gives the Board a very broad discretion. In reviewing all of the circumstances of a particular case, the Board undoubtedly would give some weight, depending on the penalty imposed, to the fact that a complainant was disciplined for refusing an order directing that person to act contrary to the Act or to the fact that a complainant was motivated by a health and safety concern and was acting in good faith.

See also *Commonwealth Construction Company*, [1987] OLRB Rep. July 961 where the Board clearly stated that the remedial power in section 24(7) is available whether or not a violation of the OHSA has been found. At paragraph 34, after citing numerous previous cases consistent with that approach, the Board observed:

If subsection 24(7) only applied if subsection 24(1) had been contravened, it would be redundant, as the Board already has such power in these circumstances, by virtue of subsection 24(3), which makes all of the subsections of section 89 of the Labour Relations Act, except subsection (5), applicable with all necessary modifications to a complaint filed under subsection 24(2). Thus, the Board's power to remedy the contravention of subsection 24(1) by, for example, submitting a lesser penalty, would come from subsection 89(4) of the Labour Relations Act as incorporated into section 24 by subsection 24 (3).

• • • •

In circumstances such as those in the instant case, where the Board has determined that the employer has not breached the Act in its discharge of an employee, it is both sensible and in accord with the specific wording of subsection 7 for the Board to then inquire whether the employer's disciplinary response was nevertheless appropriate in all the circumstances.

The circumstances of that case included a finding that the complainants, acting as self-appointed safety representatives, were not exercising rights under the OHSA when doing safety inspections on company time. However, the Board exercised its discretion to reduce the discharges to five day suspensions for two out of the three complainants after considering all the circumstances, including prior disciplinary records.

45. In *The Corporation of the City of Ottawa*, [1986] OLRB Rep. June 798, the complainants were found to have been insubordinate, and no violation of the Act to have occurred. How-

ever, they had been acting on advice relating to the OHSA on which the Board found it was reasonable to rely. It exercised its discretion to reduce the penalty from discharge, ordering reinstatement without back pay. In doing so the Board commented that if the Board were satisfied that the complainant was simply acting on his previously articulated threat "to tie [his supervisor]" up so badly with Bill 70 that he couldn't move, any thought of mitigation of the complainant's penalty would be out of the question."

46. In a case where the Board found that a continued refusal to work was not based on reasonable grounds, and thus no violation had occurred, *Camco Inc.*, [1985] OLRB Rep. Oct. 1431, the Board commented that it must go on to consider the choice of penalty. Because it was mild, it chose not to interfere. Similarly in *Baltimore Aircoil of Canada*, [1982] OLRB, Rep. Mar 327, the Board found that no violation of the OHSA occurred where the complainant was disciplined for unauthorized self-help on safety matters, assessed the penalty imposed as warranted, and declined to interfere.

47. In the above cases in which the discretion to modify the penalty was exercised, there was a clear nexus to health and safety. Despite the lack of finding of a violation, each case involved a purported, usually somewhat mistaken, but in some sense bona fide, attempt to exercise rights under the OHSA. As it was put in *Ministry of Community and Social Services*, *supra*, it is appropriate under this section to give some weight to the fact that a complainant was acting in good faith, motivated by a health and safety concern. Where this is not the case the Board will appropriately consider the absence of a bona fide health and safety concern, or lack of good faith in making the complaint, as a weighty factor which might lead to its declining to exercise this discretion as it did in *The Corporation of the City of Ottawa*, *supra*.

48. On our facts, we have found that the complainant was attempting to comply with the OHSA in returning the keys to Dr. Mansfield instead of to the employer directly. Despite the fact that we have not made a positive finding that there was a duty under the Act in which she was acting in compliance, we have found her to be sincere in her actions. We find that she was acting in consonance with the purpose of section 34(1)(d) as to confidential records and in a bona fide attempt to comply with the confidentiality provisions of the OHSA. This is a case in which, violation or not, it is appropriate to review the penalty imposed under section 24(7).

49. It is clear that Ms. Barry's employment was not in jeopardy prior to the "keys incident". She had been laid off rather than fired shortly before, and she had no disciplinary record. Although Mr. Mercer was disenchanted with her performance in general, she was not on notice of this dissatisfaction, and had no reason to believe she would not be recalled at the end of the labour dispute. Although her language to Ms. Baxter was clearly uncalled for, it was not argued that she would have been discharged for this alone. We are of the view that the employer overreacted and gave inadequate weight to the seriousness of Ms. Barry's concerns for confidentiality, supported as they were by advice from the Ministry of Labour, in its possession prior to the discharge. However, we are of the view that Ms. Barry's loss of temper and abusive language are deserving of some discipline, although not of discharge. In this context we would observe that the whole dispute could have been avoided by the exercise of more objectivity on both sides. At the time of the telephone conversation which prompted the discharge, the keys had already been returned, albeit not to Ms. Baxter directly. Ms. Barry was voicing concerns that the employer knew by the time of the discharge to be legitimate for an occupational health and safety nurse, even if it disagreed as to the extent of her obligation. On the other hand, if Ms. Barry had explained the situation more thoroughly, in a dispassionate manner, even if she did not feel it should have been necessary, the matter would not likely have come to such a precipitous head. We therefore order all record of her discharge removed from Ms. Barry's employment record. Given the absence of a disciplinary record,



we would substitute instead a written warning for her use of inappropriate language in expressing her disagreement with Ms. Baxter. Ms. Barry did not request reinstatement as she has obtained other employment. We make no order for monetary compensation as there were no monetary losses. In all the circumstances, we do not find this an appropriate case for further remedial orders.

**DECISION OF BOARD MEMBER JUDITH A. RUNDLE; July 17, 1990**

1. I disagree with the majority findings in paragraph 48 and dissent from that finding for the following reasons.

2. Two facts appear to have been overlooked in the majority decision. Ms. Barry, prior to advising the company that she had returned the keys to Dr. Mansfield, advised the union president (who was on the picket line) of her actions. Secondly, there was an internal reorganization which changed Ms. Barry's reporting relationship requiring her to report to Ms. Baxter. An arrangement which was clearly not to Ms. Barry's liking. These are facts which clearly go to the very heart of Ms. Barry's motive.

3. This is a case which turns on an assessment of the credibility of the central witness, Ms. Judy Barry. In assessing Ms. Barry's evidence I found her to be less than credible. With respect to the majority view this is a case where truth is stranger than fiction.

4. The keys to the filing cabinets which Ms. Barry was requested to return are the property of the company as were the records contained in those cabinets. Ms. Barry's insubordination with respect to the request to return "company property" was worthy of discipline. Her concern about confidentiality of the health records was based on the Health Disciplines Act and her responsibility in that regard. Her claim under the Occupational Health and Safety Act was an ex post facto rationalization of her actions designed solely to obtain a remedy unavailable to her by any other means.

5. Ms. Barry did not at any time during the prolonged discussions with the company, make reference to section 34(1)(d) of the Occupational Health and Safety Act. An extensive review of Ms. Barry's resume as well as her verbal evidence led the Board to believe that Ms. Barry considered herself to be very knowledgeable in the field of Occupational Health and Safety. Why then did Ms. Barry not initially advise the company of her reliance on section 34(1)(d) of the Occupational Health and Safety Act with respect to the records? By doing so Ms. Barry would have placed herself under the full protection of the Occupational Health and Safety Act. Clearly it was not in Ms. Barry's mind that the company was in violation of any aspect of the Occupational Health and Safety Act - her actions were clearly ex post facto.

6. Ms. Barry as a trained company "professional" in the field of Occupational Health and Safety ought to have known if "any medical examination, test or x-ray of a worker made or taken under this Act" (section 34(1)(d)) had indeed been ordered. I do not find Ms. Barry's evidence with respect to her familiarity with only 40% of the employees records credible. It was her responsibility to familiarize herself with any orders directed under the Act. She certainly took a keen interest in the audiometric testing, which, because noise has not yet been ruled a designated substance, does not therefore fall under the ambit of 34(1)(d). Ms. Barry's evidence was that she did not know if any tests such as those contemplated under section 34(1)(d) had been ordered, yet this is the very section she relies on as the basis of her complaint.

7. The evidence clearly states that the records Ms. Barry was protecting were from time to time accessed by non-medical personnel who completed insurance claims from the material claimed in the Health office. The physician's medical records were kept in a separate locked filing cabinet in a locked room adjacent to the health office and were never accessed by the company.

Varying degrees of confidentiality with respect to health records were the standard of the health office.

8. I disagree with the majority finding in paragraph 48. Ms. Barry was not acting in compliance with the Occupational Health and Safety Act in returning the keys to Dr. Mansfield. I conclude from the evidence that the Occupational Health and Safety Act was not in Ms. Barry's mind at the time of her actions.

9. On the evidence before us there is no clear nexus to health and safety in this case and no bona fide health and safety concern as contemplated by the Occupational Health and Safety Act in this. There was certainly a lack of good faith as evidenced by Ms. Barry's true reasons for bringing this complaint.

10. As there is no clear nexus to health and safety there is no Board jurisdiction to review the penalty imposed under section 24(7).

11. For the above reasons I would have dismissed the complaint.

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**2147-89-R Teamsters Local Union 879 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Cronkwright Transport Limited, Erie Employee Services Ltd., Respondents**

**Related Employer - Cronkwright truckload carrier contracting out shunt service to Horton for eight years with no objection from union - Cronkwright ending contract and contracting work to a related company Erie - Respondents Cronkwright and Erie admitting essential ingredients for a one employer declaration but arguing Board should exercise its discretion to refuse declaration - Board making declaration - Potential erosion of union's bargaining rights - Cronkwright cannot avoid consequences flowing from doing work directly by entering into an arrangement with a related employer**

**BEFORE:** *Bram Herlich*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

**APPEARANCES:** *N. L. Jesin* and *D. MacIlravey* for the applicant; *Roy Filion*, *Donna Guidolin*, *Jack Cronkwright* and *Cliff Bennett* for the respondents.

**DECISION OF BRAM HERLICH, VICE-CHAIR AND BOARD MEMBER B. L. ARMSTRONG:**  
June 22, 1990

1. The style of cause is hereby amended to reflect the correct name of the second respondent as: "Erie Employee Services Ltd." Further, the parties agreed that there is no entity named "Lake Erie Shunt Works" and that named respondent should not be included in this application.

2. This is an application under sections 1(4) and 63 of the *Labour Relations Act*. The applicant seeks a declaration that Erie Employee Services Ltd. (hereinafter referred to as "Erie") is bound by the terms of a collective agreement between Cronkwright Transport Limited (hereinafter referred to as "Cronkwright") and the applicant (sometimes referred to as the "union").

3. During the course of the hearing the applicant indicated that it was not pursuing the application insofar as it relates to section 63 of the Act. To the extent the application relates to section 63, it is therefore dismissed.

4. Section 1(4) of the Act provides:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

## FACTS

5. The Board heard evidence from Jack Cronkwright, president of Cronkwright and from Clifford Bennett who is Cronkwright's maintenance supervisor as well as a shareholder, officer and director of Erie. Although Mr. Bennett was not called to testify by either Erie or Cronkwright, he was, pursuant to the union's request and in view of the requirements of section 1(5), made available for cross-examination by the union. The union called no *viva voce* evidence.

6. Cronkwright is a full truckload carrier and has been in the business for a considerable period. The union was certified to represent its employees in 1964. Prior to 1980 Cronkwright provided some services on a sporadic basis to Stelco at a number of terminals throughout Ontario. In June of 1980 Cronkwright secured an account to service the Stelco Lake Erie Works facility at Nanticoke. The work involved hauling steel slabs or plates by flat bed trailer. The slabs were picked up and hauled away from an area of the Stelco facility known as door #15.

7. Within a few months of commencing this hauling work Cronkwright was requested, by Stelco, to provide a shunt service whereby loaded trailers could be moved from shipping door #15 and deposited in a compound located on Stelco property about 2 kilometres from door #15 to await delivery to their ultimate destination. Stelco apparently made the request in an effort to maximize efficiency and reduce congestion at its loading dock. From Cronkwright's point of view this arrangement was not more efficient - it would require extra trailers, at least one extra tractor and driver, and would also require the extra work associated with hooking and unhooking of trailers in the shunt compound area. Notwithstanding this, Cronkwright agreed to provide Stelco with the requested shunt service.

8. The work associated with providing the shunt service was contracted out to Bruce Horton who carried on business as Horton Shunt Service. Horton had previously been an owner-operator for Cronkwright and had regularly hauled freight from the Stelco facility. Horton continued to provide the shunt service until the fall of 1988 when his contract was terminated by Cronkwright in circumstances to be described later. During the duration of his contract with Cronkwright, Horton had varying numbers of trucks involved in the shunt service. For the most part, however, it appears that Horton had one vehicle (leased from Cronkwright) used exclusively for shunt work and another used alternately for back-up purposes in the shunt operation and for highway driving (Horton, until sometime in 1982, continued to do some highway runs for Cronkwright in addition to the shunt work). The work associated with the shunt operation was performed by Horton, his spouse and, as required, drivers employed directly by Horton. The precise number of persons employed by Horton was not disclosed and appears to have been minimal.

9. The union was aware from the outset that this shunting work was being performed by



orton. Neither Horton nor any of the persons working with him were treated as employees of Cronkwright nor were the terms of the collective agreement applied to them. No grievance challenging the contracting out of this work to Horton was ever filed by the union. However, on occasions when Horton was unable to provide the shunting services required he was "backed up" by Cronkwright employees and equipment. The necessity for Cronkwright to provide this back-up increased over time and, as we shall see, became particularly significant during the latter stage of Horton's contract with Cronkwright. Whenever full-time Cronkwright employees provided the back-up service for the shunting operation they were paid pursuant to and were otherwise covered by the terms of the collective agreement.

10. Sometime in mid-1983 Stelco began the manufacture and shipping of steel coils at the Nanticoke facility. Coils were shipped from an area known as door #22. At the time Cronkwright was the exclusive road hauler for steel slabs and was concerned to maintain that status and, if possible, extend it to the hauling of coils. The issue of providing a shunt service at door #22 arose and Cronkwright initially and no doubt for reasons already canvassed, resisted the implementation of such a service. However, once it became clear that its continuing resistance might harm its competitive position (other competitors were prepared to provide the service) Cronkwright agreed to provide it.

11. Cronkwright considered providing the shunt service at door #22 through Horton but it was readily apparent that the volume of work to be added to his door #15 shunt work was beyond his means. Cronkwright therefore provided the shunt service at door #22 directly through its own employees using its own equipment. Three tractors and six drivers were employed to provide a 24 hour operation.

12. Thus, from 1980 the shunt service at door #15 was provided through Horton (with "back-up" as required provided by Cronkwright employees) while, from its inception in late 1985 or early 1986, the shunt service at door #22 was provided directly by Cronkwright employees covered by the terms of the collective agreement (when necessary Horton might provide back-up service at door #22 but this was a relatively rare occurrence).

13. The arrangement between Cronkwright and Horton was formally terminated by letter dated October 18, 1988 effective November 1, 1988. Cronkwright had become increasingly dissatisfied with Horton's performance. Communication difficulties were detailed in Cronkwright's evidence. Cronkwright determined it needed to have greater direct control over the shunting operation. Furthermore, Horton's reliability deteriorated significantly in the weeks and months leading up to November of 1988. The proportion of occasions upon which Cronkwright had to provide back-up at door #15 increased dramatically. In September of 1988 Horton's then only shunt tractor broke down and was not repaired. Consequently the amount of shunt work at door #15 performed directly by Cronkwright employees increased to the point that by (and for the entire month of) October 1988 the door #15 shunt work was performed exclusively by Cronkwright employees.

14. Commencing in November of 1988 Cronkwright entered into an arrangement with Erie to provide the shunt service at door #15. The parameters of this new arrangement resemble those of the former arrangement between Cronkwright and Horton. The relationship of Erie to Cronkwright, however, is significantly different. The directors and officers of Erie are all spouses of the directors and officers of Cronkwright. Erie was incorporated in 1981 for purposes not relevant to the present application. Suffice it to say that Erie remained essentially inactive from its inception until November of 1988 when, operating as Erie Shunter Services, it began to provide the shunt service at door #15.

15. A number of factors entered into Cronkwright's decision to assign the door #15 shunt-

ing work to Erie. Mr. Cronkwright testified that this work had always been contracted out and Cronkwright preferred to maintain that situation. The cost of the shunting service (at both doors #15 and #22) is not recovered directly from Stelco, rather this is a service whose cost Cronkwright has had to absorb in the context of its total service for Stelco. Horton billed Cronkwright on a per load basis and Cronkwright preferred to maintain that arrangement as well, in preference to what one must infer would have been the greater cost of paying wages under the terms of the agreement. Erie has continued to bill Cronkwright on a per load basis although the rates have been increased approximately 7%. Cronkwright also acknowledged that a further reason for entering into the arrangement with Erie was so that Cronkwright could attain a greater degree of direct control over the shunting operation.

16. Erie began to provide the shunting service in November of 1988. By letter dated November 29, 1988 the union filed a policy grievance as follows:

The Local Union contends that Cronkwright Transport is in violation of the Collective Agreement by subcontracting out work normally performed by members of the bargaining unit.

The Company has instituted an operation at Stelco in Nanticoke known as "Lake Erie Shunt Works" in which it has non-union drivers performing shunt work. This practice should cease immediately.

Please contact the undersigned as soon as possible to arrange a meeting to resolve this important matter.

17. Although there was no direct evidence on point, it would appear, from the submissions of counsel, that the arbitration hearing arising out of this grievance was adjourned pending the disposition of the present application. This application was filed on November 29, 1989.

18. Provisions of the collective agreement which may be relevant to our considerations include the following:

- 1.2 The Company recognizes the Union as the exclusive bargaining agent for its employees as described below:

The term "employee" shall mean all employees save and except foremen, those above the rank of foreman, office staff, sales staff, security guards, office janitors, and probationary employees as defined in Article 8 of this Agreement. For the purpose of clarification of the above, (1) security guards may not dispense fuel and scale equipment and will not be allowed to operate, maintain, or handle vehicles, (2) personnel fueling and scaling as part of their duties who perform any other work coming within the scope of the Bargaining unit will be included in the Bargaining Unit.

#### ARTICLE 9

##### BROKERS

- 9.1 A broker is a subcontractor who leases equipment to the Company. Such broker will not hire drivers and will lease only one (1) tractor to the Company. Nothing in this Agreement shall be construed in such a manner that will class drivers of such equipment as employees of the Company who is a party to this Agreement. The Company shall not operate any equipment in any manner in contravention of the P.C.V. Act.
- 9.2 It is agreed that employees on the seniority list as of July 5, 1987 shall not be laid off as the direct result of the Company extending contracting out work to Owner-Operators.
- 9.3 Should the Company extend its present broker operations, the Company will give to

the existing qualified drivers with seniority, in order of seniority, the first opportunity to sub-contract, and thus become a broker.

9.4 It is agreed between the Company and the Union that for purposes of work assignment and layoff due to a shortage of work, the length of service of brokers shall be recognized in the same manner as the length of service of an employee under the terms of this Agreement, and where the broker was formerly an employee, the length of service as an employee shall be accumulative with the length of service as a broker.

9.5 The Company agrees to remit to the Local Union, an amount equal to the Local Union's monthly dues for all brokers operating for the Company.

### Positions of the Parties

19. The respondents candidly acknowledged that they are separate corporations under common control or direction which carry on associated or related businesses. While they agree, therefore, that the essential ingredients for a related employer finding are present, they argue that the Board ought not to exercise its discretion to grant the relief requested. Their argument is essentially twofold.

20. First, assert the respondents, the work in question is work which has never been sought or claimed by the union (indeed there was evidence that a grievance resulted when an employee who refused to do shunting work at door #15 was sent home). In the circumstances and given the history of the parties' treatment of the work in question, the work never fell within the scope of work defined under the collective agreement. Consequently, there has been no erosion of bargaining rights and were the Board to grant the relief requested we would be extending, not merely preserving the union's bargaining rights. In support of its position the respondents relied upon the decisions of the Board in *Industrial-Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029; *West York Construction Limited and Bau Canada Limited*, [1978] OLRB Rep. Sept. 879; *Capricorn Acoustics & Drywall Ltd.*, [1986] OLRB Rep. Mar. 308; *Donald A. Foley Limited*, [1980] OLRB Rep. Apr. 436; *The John Hayman & Sons Company Limited*, [1984] OLRB Rep. June 822; *Millwork & Building Supplies Limited*, [1986] OLRB Rep. Nov. 1550; and *Mandic Bros. Drywall and Const. Ltd.*, [1982] OLRB Rep. May 693.

21. In the alternative, the respondents asserted that the union's delay in bringing the present application ought to be fatal to its case. In this regard the respondents relied upon *Harold R. Stark Limited*, [1978] OLRB Rep. Oct. 945; *Ferro Structural Steel (Toronto) Limited*, [1981] OLRB Rep. May 523; *Farquhar Construction Limited*, [1978] OLRB Rep. Oct. 914; *Bramalea Carpentry Associates*, [1981] OLRB Rep. July 844; and *Ellwall and Sons Construction Limited*, [1978] OLRB Rep. June 535.

22. The union argued that this was a classic case of the mischief section 1(4) was enacted to remedy and responded to the two major grounds advanced by the respondents in support of their argument that the Board's discretion ought not to be exercised in the present case.

23. The union asserted that the nature of the relationship between the two respondents is fundamentally different from that which formerly existed between Cronkwright and Horton. Consequently, whatever steps the union did or did not take in relation to the work performed by Horton have no bearing on the present application. The work performed by Erie is clearly bargaining unit work and the issuance of the relief being sought would preserve and not extend bargaining rights.

24. Further, the union points to the timely filing of its grievance and denies any suggestion it has slept on its rights.



25. In support of its position the union referred the Board to *Brinks Canada Limited*, [1987] OLRB Rep. May 647; *Don Mills Bindery Inc.*, [1983] OLRB Rep. Dec. 2008; *W. F. Stevens Reproductions Inc.*, [1984] OLRB Rep. Apr. 674; and *Federated Building Maintenance Company Limited*, [1985] OLRB Rep. Nov. 1585.

## DECISION

26. In *Ethyl Canada, Inc.*, [1982] OLRB Rep. July 998 at paragraph 37 and 38 the Board described the purpose of subsection 1(4) as follows:

37. Section 1(4) of the Act deals with situations where the economic activity giving rise to the employment is or can be carried out through more than one legal entity. In such circumstances an alteration in legal form, or a transfer of work from one legal entity to another, can undermine established collective bargaining rights. Section 1(4) ensures that the institutional rights of the trade union and the contractual rights of its members, will attach to a definable commercial activity rather than the particular legal vehicle(s) through which that activity is carried on. Legal form is not permitted to obscure economic and collective bargaining realities. In this respect Section 1(4) creates a regime of collective bargaining law which significantly modifies common law notions of privity of contract or the corporate veil. However, while the language of section 1(4) is very broad, the section is not intended to apply in every case which in a general or linguistic sense meets its statutory criteria. The Board has a discretion concerning the application of section 1(4) and, in the past, it has exercised that discretion carefully, in light of the circumstances of each case, and labour relations policy considerations.

38. The Board accepts the applicant's submission that section 1(4) may impose some limits on the degree to which an employer can avoid its obligations under a collective agreement by substituting the employees of another employer for its own. There is something to the notion that a company cannot subcontract to itself, or what may be the same thing, to an entity totally controlled by it.

27. Dealing first with the respondents' submissions regarding delay, the Board is satisfied that the union's conduct was not such as to foreclose relief in the present case.

28. The cases referred to by the respondents involve delays in the range of 8-12 months to several years between the time the applicants knew (or ought to have known with reasonable diligence) that the respondents were related and the time that the 1(4) applications were brought. We would note as well that in none of those cases were timely grievances filed putting the employer on notice as to the union's objections. In the present case there is nothing to suggest that the union knew or ought to have known of Erie's existence prior to November of 1988. While the present application was not filed until one year later, the grievance already referred to was filed promptly.

29. While the respondents argue that the terms of the grievance are neither clear nor compelling, the Board is satisfied that, whether or not the grievance is skillfully drafted and whether or not its success depends on the outcome of the present application, the grievance clearly indicated the union's challenge to the propriety of the assignment of the work to Erie.

30. The respondents argued that no decision of this Board has treated the filing of a grievance (in the absence of the filing of a related employer application) as "stopping the clock" in relation to any requirement to file a related employer application in a timely manner. Even the case relied upon by the union, *Brink's Canada Limited*, *supra*, involved the filing of a grievance and subsequent 1(4) application within a period of two months.

31. The Board is of the view, however, that the facts of the present case more closely resemble those in *Krest Masonry Contracting Limited*, [1988] OLRB Rep. Aug. 813. In that case some two years elapsed between the time the union became aware of the related employer and the

filing of the application. While no grievance was filed during that period, the issue was the subject of ongoing discussions between the parties initiated promptly by the union. The Board concluded that, in the circumstances, the union's failure to expeditiously bring its application to the Board should not totally foreclose the remedy sought. The Board did, however, limit the retrospective effect of its declaration to the date of filing the application in an effort to balance the competing commercial, collective bargaining, equitable and practical concerns. Had the period between the filing of the grievance and the present application been as protracted as the comparable period in *Krest* the Board might have considered, had the parties addressed the point, limiting the retrospective effect of any declaration. Given that Cronkwright was aware from the outset of the union's objection to the arrangement with Erie, we see no reason to foreclose or limit the relief otherwise available to the union.

32. We turn now to the consideration of the respondents' primary position. First, what significance, if any, should the Board attach to the fact that the work in question was initially contracted out to Horton with no objection from the union? We do not find the union's failure to grieve this arrangement surprising. While the collective agreement (Article 9) contains some limitations on Cronkwright's right to contract out, it is not readily apparent that Cronkwright's arrangement with Horton runs contrary to any of those provisions. But even if a grievance would have been unlikely to succeed, the union could have brought a related employer application seeking to have Horton bound by the terms of the collective agreement. Should its failure, over a period of 8 years, to act against Horton preclude it from acting against Erie? We think not.

33. It would not be productive to speculate in great detail or, indeed, to decide the merits of a 1(4) application which is not before us. Suffice it to say that while the Board has granted 1(4) relief in cases involving what appears, on the surface, to be legitimate contracting out of work to an entity operating at arm's length from the employer, the contours of such cases are dramatically different from cases like the present application (see, for example, *Kennedy Lodge*, [1984] OLRB Rep. July 931). Indeed, as Mr. Filion candidly acknowledged, the situation involving Cronkwright and Horton was not as clear cut as the present situation between Cronkwright and Erie. There is a fundamental difference, which this Board has recognized, between bona fide contracting out to an arm's length entity and contracting out to oneself or, what may amount to the same thing, to an entity which one totally controls (see the comments already cited in *Ethyl Canada, Inc.*, *supra*; and in *Donald A. Foley Limited*, [1980] OLRB Rep. Apr. 436).

34. The current relationship between Cronkwright and Erie is so fundamentally different from the former arrangement between Cronkwright and Horton that we cannot conclude that the union's failure to bring a related employer application in respect of Horton should preclude it from bringing the present application.

35. This leads to what the respondents appear to have identified as the central issue in this case. Is the work in question bargaining unit work? If it is not, as the respondents claim, then there is clearly no erosion of bargaining rights and the application must fail. If it is, as the union claims, then to the extent that Cronkwright is contracting the work out to itself (as opposed to a bona fide contracting out to an independent arm's length contractor) then there is an erosion of bargaining rights which the Board would normally remedy.

36. The scope clause of the collective agreement is in a relatively standard "all employee" format. There is no meaningful distinction, relevant to our purposes, between the shunt work performed at door #22 and that at door #15 (whether performed by Horton, Erie or Cronkwright). At first blush there is no reason to conclude that shunt work performed at either door would not fall under the agreement. Less evident is the conclusion that the work at door #22 falls within the

agreement while that at door #15 does not. Less evident still is the conclusion that the work at door #15 is not bargaining unit work when performed by Horton or Erie but is bargaining unit work when performed by Cronkwright. Whatever the history and propriety of contracting out (part of) the shunt work, the Board fails to see how its character as work falling within the union's bargaining rights is altered. Cronkwright may well be fully entitled to continue to legitimately contract out some or all of this work. When, however, it decided to (effectively) contract it out to itself, we see no reason not to look to the related employer provision of the Act.

37. The respondents assertion that there has been no erosion of bargaining rights escapes us. In circumstances where the very work in question (at door #15) and substantially, if not entirely, identical work (at door #22) have, in the past, been regularly performed by bargaining unit employees, we can only conclude that there has at least been a potential erosion of the union's bargaining rights as a result of Cronkwright's arrangement with Erie.

38. The union in the present case neither grieved nor brought any section 1(4) application in relation to Horton. In the circumstances, we cannot conclude that by this inaction, the union irrevocably waived the right to assert that the work performed by Horton would fall under the jurisdiction of the collective agreement if and when such work was performed directly by Cronkwright (as has already occurred) or, alternatively, if and when it was performed by a related employer. It may well be that had Cronkwright elected to continue to legitimately contract the work out to an arm's length contractor, such arrangement would be insulated from attack through either the grievance procedure or a related employer application. Cronkwright has chosen, however, for reasons which include its desire to exercise greater direct control over the work, to enter into an arrangement with a related company. Not only does this choice exhibit the classic hallmarks of related employer cases, it also, in our view, more closely resembles a choice to perform the work directly than a choice to contract it out. Granting the union's application will not directly alter the fundamental choices available to the employer or the consequences flowing from those choices. Where the work has been performed by bargaining unit employees, those employees have been treated as falling within the collective agreement. Where the work was legitimately contracted out to an independent third party, the persons doing the work have not been covered by the collective agreement. The employer cannot avoid whatever consequences flow from doing the work directly by entering into an arrangement with a related employer. The difference between Cronkwright performing the work directly and the current arrangement with Erie is a difference in form not substance.

39. The parties agree that the essential ingredients for a related employer finding are present. We are not persuaded that there is any reason not to exercise our discretion in this case.

40. On the basis of the evidence before us and pursuant to section 1(4) of the Act, we find that the respondents are carrying on associated or related businesses under common control and direction, and we direct that they be treated as constituting one employer for the purposes of the *Labour Relations Act*. We further declare that Erie is bound to the collective agreement between Cronkwright and the applicant as if Erie had been a party thereto.

#### **DECISION OF BOARD MEMBER R. M. SLOAN; June 22, 1990**

1. I must respectfully dissent from the majority decision.

2. The application by the trade union, in the circumstances of this case, requires its dismissal on a number of significant grounds but, in my view, the most significant is the denial of the fundamental right of the employees of Erie Employee Services Ltd. ("Erie") to exercise a free



choice with regard to union representation, a right guaranteed under section 3 of the Ontario *Labour Relations Act* ("The Act").

3. In support of my dissenting opinion, I will summarize what I believe to be the salient facts:

(a) Applicant Aware of Contracting of Shunt Work

For over nine(9) years the shunting operation now being performed by Erie was performed by a contractor - which Erie continues to be, having replaced Horton's Shunt Service ("HSS") on November 1, 1988; The applicant was fully aware of these circumstances.

(b) (i) The Shunt Work Was Never Bargaining Unit Work

During all of the above-mentioned period, indeed right up to the time of the subject application, the work done by HSS was considered by both the trade union and Cronkwright to be outside the bargaining unit covered by the collective agreement between the union and Cronkwright. The applicant made no representation at the hearing that its view in this regard had changed;

(ii) Prior to this application the union never claimed either the work or any persons performing the work as being within its jurisdiction under the collective agreement;

(iii) No persons engaged in the contracted work as employees of HSS or Erie were or are members of the applicant nor did they pay union dues;

(iv) The applicant at no time made any representations to HSS or Cronkwright regarding any claim for jurisdiction over the shunting operation. Nor did the applicant file an application under section 1(4) of the Act challenging the contracting relationship between Cronkwright and HSS which continues today as essentially the same contracting arrangement but between Cronkwright and Erie;

(c) (i) There were no lost jobs;

(ii) The union was not prejudiced in any way.

(d) Erie as a legal entity existed before the shunting contract was entered into with Cronkwright, having been incorporated on July 17, 1981. Erie was established to provide various trucking industry related services such as: driver services; placement services; and a number of legitimate corporate considerations. The contracting of the shunting work melds appropriately into the established purposes of Erie;

(e) The effectiveness of the shunting operation performed by HSS was such that Cronkwright, to protect its larger trucking interests-among

other reasons- sought a replacement contractor and entered into an agreement with Erie;

4. Counsel for the respondent in his opening comments advised the Board that Cronk-wright and Erie are related businesses operating under common direction and control but asserted that this is not an appropriate case for the Board to exercise its discretion to declare the two corporations as one under section 1(4).

5. Purpose of Section 1(4)

(i) The Board in File No. 0535-78-R, *West York Construction Limited*, and *Bay Canada Limited*, [1978] OLRB Rep. Sept. 879, stated in paragraph 9 (in part):

The Board, when deciding the exercise of its discretion in any particular fact situation, must have regard for the purpose of section 1(4) in the scheme of the Act. *That purpose stated generally, is to protect against the frustration of bargaining rights which have already been earned by a trade union, or the frustration of a trade union's efforts to gain them and to prevent the undue fragmentation of bargaining rights...*

[emphasis added]

In seeing that the purpose of the section is properly realized, the Board is concerned with several questions.

- a) Is the applicant attempting to disturb existing bargaining rights?
- b) Is the applicant attempting to circumvent the normal process of certification by means of section 1(4)?
- c) Are there employees whose rights under the Act to choose their own bargaining agent would be interfered with?
- d) Has the applicant come within a reasonable period of time of becoming aware that the two respondents are closely associated in their business?

(ii) The answers to the above-noted four (4) questions are: *Yes*, despite its present position the applicant by its conduct has effectively acknowledged that the work for which they are seeking certification is not bargaining unit work; *Yes*, the applicant has chosen to attempt to obtain a favourable Board ruling which will save them the work and expenses of a normal representation effort; *Yes* - emphatically; *No* the applicant was well aware of this shunt operation for the best part of ten (10) years and further emphasized its disinterest by not filing the present application until thirteen (13) months after the contract between Cronkwright and Erie became effective.

(iii) It is clear from previous Board rulings that the purpose of section 1(4) is "...to cure the mischief that results from being unable to adequately define the employment relationship and in order to prevent the erosion of bargaining rights" (Sack and Mitchell (1985) section 6:5100). It is also abundantly clear that neither of the above considerations pertain under the circumstances of this case.

6. Timeliness

To say that the applicant slept soundly on its rights would not be an exaggeration. If the majority decision discounts the nearly ten (10) years when the applicant could have attempted to acquire representation rights through direct contact with the employees doing the shunt work or through a

section 1(4) application, there is still the inordinate delay of some thirteen (13) months between the time the union knew or should have known about the contract entered into between Cronkwright and Erie. The "grievance" upon which the applicant attempts to rely to support the timeliness of its application can be discounted by the Board because it contains - according to the respondent - and uncontested by the applicant - "statements which are misleading, inaccurate and false".

7. Extension of Bargaining Rights

Again it is clear from the evidence that the applicant is attempting to extend its bargaining rights. Board jurisprudence has not supported such efforts. The Board has however, where appropriate, listened to arguments with respect to the "erosion" of bargaining right - a claim which the applicant has not made and cannot make in this case.

8. Right of Contract

Another issue which the majority decision fails to address is the argument by the respondent that the union, by seeking to unreasonably extend its bargaining rights to the shunt operation, has deprived Cronkwright from entering into a legitimate contractual relationship with Erie. The two afore-mentioned entities operate independently in such matters as the work performed, and the persons employed to do the shunt work, notwithstanding the "common direction and control" admission.

9. Right to Free Choice

The majority decision in the final analysis is flawed in that it fails to address a fundamental issue raised by counsel for the respondent - that issue is the clear and unambiguous right of the Erie employees to freely decide whether or not they wish to be represented by a trade union.

The Board has a duty to protect the rights of individual employees and should under no circumstances abrogate these rights - a result which clearly flows from the majority decision.

10. For all of the reasons indicated above I would dismiss this section 1(4) application.

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**0915-89-R; 0916-89-U; 1172-89-U United Food and Commercial Workers International Union, Local 175, Applicant v. David Chapman's Icecream Limited, Respondent; United Food and Commercial Workers International Union Local 175, Complainant v. David Chapman's Icecream Limited, Respondent**

**Certification Where Act Contravened - Discharge - Interference in Trade Unions - Unfair Labour Practice - Employer making layoff prediction in bulletin to employees - Bulletin distributed during union organizing campaign - Key union organizer terminated - Refusal to hire person who might have become a union supporter - Termination found to be a breach of the Act - Union certified without vote pursuant to s.8**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Ronson* and *H. Peacock*.

**APPEARANCES:** *Douglas J. Wray*, *Michael A. Church*, *Michael McBride*, *William Richardson* and



*John Hurley* for the applicant/complainant; *R. C. Fillion, Mike Failes, Maureen Fitzgerald, David Chapman* and *John Rammage* for the respondent.

**DECISION OF THE R. O. MACDOWELL, ALTERNATE CHAIR AND BOARD MEMBER H. PEACOCK; June 26, 1990**

**I**

1. This is an application for certification which was consolidated with a related unfair labour practice complaint.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the representations of the parties, the Board finds that there are two units of employees appropriate for collective bargaining. Those units are described as follows:

Bargaining Unit #1 (Full-time)

all employees of David Chapman's Icecream in the Town of Markdale, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period,

Bargaining Unit #2 (Part-time)

all employees of David Chapman's Icecream in the Town of Markdale, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff.

4. In support of this application for certification the trade union has filed documentary evidence of membership in the form of cards, each of which consists of a combination application for membership and an attached receipt. Each card is signed by the prospective member, countersigned by the "collector" and confirms the payment of one dollar in respect of union membership fees. The cards meet the formal requirements of the Act and Rules, and were filed in a timely fashion. There is no allegation of impropriety in the manner in which the cards were collected, and therefore no reason to believe that they do not represent the voluntary wishes of the employees who signed them. In each case the employee, by signing the card and making a one dollar payment, has become a "member" of the trade union within the meaning of section 1(1)(p) of the Act, and has indicated his/her desire to be represented by the union in collective bargaining.
5. On the basis of the documentary evidence before it, the Board finds that more than forty-five per cent (but less than fifty-five per cent) of the employees in the "full-time bargaining unit" were members of the union on July 19, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(g) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Similarly, the Board finds that more than thirty-five per cent (but less than fifty-five per cent) of the employees in the "part-time bargaining unit" were members of the union on July 19, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of

the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. In short, while the union has a significant showing of membership support in each bargaining unit, in neither bargaining unit has it demonstrated the requisite level of membership support to warrant certification without recourse to a representation vote. However, the union asserts that it is entitled to certification, without a vote, by virtue of section 8 of the Act. That section reads as follows:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

The union contends that the company has improperly communicated with employees in a manner designed to undermine its organizing campaign and has illegally discharged Kevin Ward ("the grievor") its principle organizer. The union contends that Brenda Springer was also improperly discharged. The company replies that both its communications with employees and the adjustments to its employee compliment were occasioned by a price war with its major competitors. The union had nothing to do with it.

6. Before reviewing the facts as we find them, it may be useful to briefly set out the legal frame work within which the parties' rights must be determined. The provisions of the statute to which reference will be made are as follows:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a

member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

Since sections 67 and 80 were not pressed in argument, we see no need to reproduce them here.

7. Sections 64, 66 and 70 appear in that portion of the Act dealing with "unfair labour practices". Their purpose is fairly obvious. Freedom of association, and the principle of free collective bargaining, are both concepts fundamental to our labour relations system. Indeed, the Preamble to the Act provides that "it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining...". Section 3 is a further declaration of employee collective bargaining rights. However these rights would be rather hollow without effective remedies for their infringement.

8. In applying the unfair labour practice sections to an employee discharge, the Board must determine whether the reasons given for the discharge are the only reasons, and whether they are tainted, in whole or in part, by anti-union animus. The improper motive need not be the only, or even the dominant one. It is sufficient if it is in the mind of the employer and one of the grounds for the action taken. (See *R. v. Bushnell Communications Ltd.*, et al, (1973) 1 O.R. (2d) 442 (H C J), affirmed for O.R. (2d) 288 (C.A.); re: *J.M.L. Shirts Ltd. and Industrial Relations Board*, 78 CLLC ¶14,122 (N.B.Q.B.), affirmed 18 NBR (2d) 695 (S.C. Appeal Division); *Westinghouse Canada Ltd.*, [1980] OLRB Rep. Apr. 577, affirmed by the Ontario Divisional Court at 80 CLLC ¶14,062).

9. Determining motive is never a simple task, for employers seldom admit that they have committed an unfair labour practice. Thus, while motive is a key issue in an unfair labour practice case, the Board must generally rely upon circumstantial evidence and draw inferences about the employer's motivation from all of the surrounding circumstances - not just the articulated reason for the discharge. We emphasize, though, that this is not a matter of this Board second guessing an employer's decision, or imposing its own notions of fairness upon the situation. Nor is it a question of whether the employer "likes unions" or is "anti-union" in some general sense. Most employers would prefer to operate their businesses in a non-union environment. The question in each case is whether the impugned conduct was influenced in whole or in part by the fact that employees were engaging in activity protected by the statute. There must be a causal connection between animus and action.

10. Section 8 appears in the certification portion of the Act and has a somewhat different focus.

11. Ordinarily, certification is based upon a showing of majority support which is established either by documentary evidence of membership or a combination of membership cards and a representation vote. The union's task is to persuade employees of the benefits of collective bargaining and invite them to sign membership cards or vote in its favour. The Board's task is to determine the appropriate bargaining unit, determine the number of employees in it, then count the number cards and/or ballots to determine whether the union has established majority support. Sometimes, however, illegal conduct on the part of the employer may frustrate this simple statutory process. Unfair labour practices may so poison the atmosphere in the workplace, that employees are reluctant to sign union membership cards or cast ballots in favour of union representation.

12. Section 8 is designed to address that situation. Where the employer has contravened the Act in such a way that the true wishes of the employees are not likely to be ascertained, the Board may certify the applicant union if the union is able to establish support adequate for collective bar-



gaining. Section 8 prevents the employer from undermining the certification process and benefiting from its own illegal conduct.

13. With this background, then, we turn to the facts in the instant case.

### III

14. The company is a manufacturer of icecream and related products with production facilities in Markdale, Ontario. It is a family firm which is wholly owned by David and Penny Chapman. It is a seasonal business. There is a core of relatively permanent employees, and a shifting group of seasonal employees who work during the peak period from April to August.

15. The company's main product line or "fighting brand" is its 2 litre package of icecream. This item accounts for between 80 and 90 per cent of total sales. Chapman's has about 10 per cent of the total Ontario market. Its main competitors are "Ault Foods" and "Neilson's", both of which are much bigger.

16. On or about May 1, 1989 there was a sudden and unexpected burst of competition from Ault and Neilson, both of which drastically lowered the prices of their 2 litre package. The respondent was forced to do the same or risk losing customers. However, even with a significant reduction in price and an active marketing policy, there was a decline in sales and the loss of several accounts.

17. David Chapman testified that he was concerned by both the vigour and anticipated duration of this competitive challenge. He was worried that the real purpose of the price war was to put him out of business. Accordingly, apart from an aggressive pricing policy of his own, Chapman complained to the federal "Competition Branch" and sought to reorganize and streamline his own business. He promoted new product lines, changed packaging suppliers, and generally tried to "tighten up".

18. On June 19, 1989 employees were given a bulletin which described the price war and includes the following:

*"We project more lost sales. This will require less production, resulting in lay offs. We do not want to worry or upset you. We DO want to keep you informed. This whole situation is very desperate indeed. Foremost in our mind is our faithful employees. We are at the mercy of the giants and we must make some decisions we do not want to make BUT we must make them for the very survival of the company. We have always tried to be decent, fair and considerate employers. We will continue to do so. Our employees, with the longest time with us, must get 8 weeks advance written notice of a lay off. When the 8 weeks is over, if the situation has changed, then we hope to keep you with us. This action is both drastic and painful to all concerned.*

*With the help of everyone pulling together we intend, eventually, to win. We do not wish to surprise any of you with this suddenly in the future, that is why we are explaining the events today. This is NOT a notice of termination. This situation's not right and it is not fair. We are the innocent victims of circumstance. We shall do all we can do to keep everything going. We have contacted the government for there advice and guidance."*

[emphasis added]

This bulletin was handed out by members of management and was received by employees during the course of the union's organizing campaign. Despite David Chapman's testimony to the contrary, we find that a notice of this kind was unprecedented.

19. It will be seen from the bulletin that there is a firm prediction of lost production and the

lay off of permanent employees. It did not happen. The only permanent employee to be involuntarily laid off was Kevin Ward - the grievor in this matter.

20. Much of David Chapman's direct evidence concerned the price war, and his efforts to meet the competition. He was less clear on the reasons for Ward's discharge - indicating that he was not Ward's direct supervisor. Nevertheless, according to Chapman, Ward *was* lazy and uncooperative. Ward occasionally complained about his work and wanted to confine his duties to the operation of the forklift. On one occasion he had been rude to an office employee. In December 1988, he and other employees wanted to organize their own Christmas party, rather than attend the one sponsored by the company. "Scuttlebutt around the plant" (Chapman could not be specific) suggested to Chapman that Ward was unhappy in his work. According to Chapman, Ward was, the "logical choice to lay off" even though he was a permanent employee with about two and half years service.

21. In cross examination Chapman conceded that there was no production reason for Ward's lay off. Ward was not laid off because there was no work for him to do. He was terminated because he was an unsatisfactory employee.

22. The decision to terminate was made at the end of May. The termination actually took place on June 26, 1989.

23. On June 26, 1989, the grievor came to work at 5:00 a.m. as usual. This was his first day back following his vacation. At about 7:00 a.m. Chapman approached the grievor and told him to come to the office immediately. Chapman appeared to be angry.

24. When he went into the office, Ward was advised that he was a good employee, but, because of the price war, he had to be laid off. He was given two weeks pay in lieu of notice and told to seek employment elsewhere. Chapman mentioned a company called "Monroe" which might be looking for forklift drivers. When Ward asked if he should leave the plant immediately, Chapman replied in the affirmative. Chapman agreed with counsel that it would have been wiser to advise Ward of his termination before he went on vacation, or at the very least, before to his return to work.

25. As we have already noted, Chapman maintains that Ward's termination on June 26 was not motivated in any way by anti-union animus. According to Chapman, he did not learn of the trade union's organizing campaign until about July 10-12, when he received a telephone call from an employee named Arnold Kennedy. Kennedy told Chapman that a trade union organizer was approaching employees to see if they wanted to join the union. Chapman told Kennedy that he was unconcerned. As he put it "if they want to unionize, I don't see any problem".

26. In his evidence before us, Chapman was not so sanguine about the prospect of unionization. He was openly hostile to Ward, and maintained that he would never hire him back because Ward had helped to bring in the union and had disrupted the company's operations. In Chapman's opinion, he had treated his employees well and felt betrayed that some of them, including Ward, would seek to form a union. Indeed, so firm was his antipathy to persons with pro-union sympathies that he refused to hire Jake Keating, Kevin Ward's brother-in-law, who was seeking a job as a driver. Chapman testified that his initial assessment of Keating was quite favourable, but upon learning of the indirect connection with Ward, Keating was rejected because he might share Ward's opinions respecting the value of trade unions. Chapman maintained in cross examination that he was entitled to his opinion.

27. No one questions Mr. Chapman's right to have his own opinions about trade unions or

the desirability of his employees seeking union representation. But, in effect, Mr. Chapman has refused to hire Keating because he may be a union supporter or might exercise rights under the *Labour Relations Act*. If this were before us as a complaint, we would be inclined to find a breach of section 66(2) of the Act. The union urges us to conclude that that is precisely what happened on June 26 when Ward's employment was terminated.

28. There is little doubt that Chapman's assessment of Ward is correct in one respect: Ward was the key union proponent who made the initial approach to the union, helped rally support among fellow employees, helped arrange an employee information meeting at a local hotel, became the principle member of the union's "inside" organizing committee, and solicited a number of membership cards. The organizing meeting was held on May 28, 1989 at a local hotel. A number of employees attended and signed membership cards.

29. In our view, it is not without significance that the timing of this meeting coincides almost exactly with the timing of Chapman's decision to terminate the grievor's employment. It is also significant that, following the above - mentioned employee notice and Ward's discharge, the organizing campaign ground to a halt. And in our opinion, Chapman's explanation for the grievor's termination simply does not withstand close scrutiny.

30. Ward was part of the company's permanent employee compliment with some two and half years of satisfactory service. He has progressed up the ladder from one job to another and has received regular wage increases - the latest being a ten per cent increase in February 1989. His most recent bonus was greater than that of a more senior forklift operator whose job functions are similar; and, according to Mark Fisher the plant manager, the bonus level is determined on the basis of merit. In the fall of 1988 Ward was offered a promotion to the position of lead hand on the night shift, and according to Fisher he was more or less "in charge" of his work group. He has been complimented on his work on a number of occasions, and Chapman himself has rewarded him for a job well done. Chapman repeatedly denied ever saying that the grievor was "dependable" or a "good worker" or "in charge" of his work group, but in a staged request for an employment reference, surreptitiously taped by the trade union, Chapman used those very words.

31. The company has a policy respecting discipline and discharge. According to Mr. Ramage, the office administrator, Mark Fisher makes notes when employee problems come to his attention. There are no such notes concerning the grievor. Ward has never received so much as a written warning.

32. No doubt there were occasional frictions and the grievor had a strong preference for his job on the forklift, but, in context, these peccadilloes are relatively minor and do not explain either the grievor's sudden termination or the company's failure to offer him alternative work as it did to other employees subsequently laid off. It is one thing to grumble about performing alternative work when one is otherwise permanently employed. It is quite another to refuse other duties when the alternative is termination. The grievor testified that he was both willing and able to perform these alternative duties and had done the work before. On this point we believe him; moreover, it seems a little odd that he would be suddenly laid off at a time when the other experienced forklift operator in the area was off on sick leave. The manner and timing of Ward's termination is also a little unusual.

33. In our view, the connection between the price war and Ward's termination is not as clear as Chapman made it out to be. The fact is, that despite the notice to employees, Ward was the only permanent employee to be involuntarily terminated. Similarly, - again despite the notice to employees - there was no substantial change in the company's production level or work requirements. There was a moderate decline in the production of its fighting brand, but despite temporar-



ily sagging sales, production for inventory continued, and there was an increased production of other products which the company was actively marketing. In comparison with the previous June, the total number of employees and the total hours worked, were both up. During this period there were a number of new hires and employment ads ran continually in the local newspapers. The price war was real, but it does not explain why it was imperative to discharge the grievor in the manner described. And, we repeat, the decision to discharge is coincident in time with the first really visible organizing meeting which was arranged by Ward.

34. Having carefully considered the evidence, including the sequence of events and our assessment of the witnesses' relative credibility, we conclude that Kevin Ward was discharged by the respondents because of his trade union activity, contrary to sections 64, 66 and 70 of the Act.

35. By contrast, we are satisfied that Brenda Springer was not unlawfully terminated. Ms. Springer was a casual employee, hired in June, who almost immediately left work on a workers' compensation claim. She had no active role in the union, and being away from the plant at most relevant times, she had only a sketchy notion of Ward's role. Upon expressing a desire to return to work, she was told by Fisher to come to the plant and he would see if he could "fit her in"; however, upon examining the situation Fisher decided that she should be laid off along with the rest of her shift. There is nothing to make her stand out or distinguish her from these other casual employees who were also laid off. In summary, we conclude that Ms. Springer was not discharged because she was exercising rights protected by the Act.

36. We turn then to the application of section 8.

#### IV

37. For the foregoing reasons, we have found that the company has contravened the Act. We are also satisfied that the trade union has membership support adequate for collective bargaining. When section 8 replaced its predecessor provision (section 7(4) of the Act), the Legislature made it clear that majority support is no longer required before section 8 may be applied; moreover, as we have already noted, in each bargaining unit the trade union was able to establish a substantial core of support before the employer's illegal conduct brought the organizing campaign to a halt. And we have no doubt that that is what happened. A perusal of the pattern of the solicitation and signing of membership cards suggests a growing enthusiasm among employees, that is abruptly stifled by the employee notice and Ward's discharge. The evidence of Bill Richardson, a union organizer, is to the same effect.

38. In the circumstances it is very difficult to determine how much more support is there or what support could have been developed had the employer not intervened. Ward testified that further efforts to solicit cards were frequently rebuffed by employees expressing fears for their job security and pointing out what had happened to him. Nevertheless, given an appropriate remedy for the grievor so that employees will know that their rights are protected, the obligation to bargain in good faith, and the option to seek first contract arbitration should that be legally warranted, we are satisfied that there is support adequate for collective bargaining.

39. The final element of section 8 concerns the wishes of employees, and whether they can now be ascertained - for example, by a Board supervised representation vote. In our opinion, that is now unlikely. By discharging the union's key organizer at the height of the campaign, the employer has signalled in the most graphic way possible, that it is prepared to use its economic power to penalize employees who seek to exercise their rights under the Act. Any illusions about the employer's attitude to trade union adherents, were dispelled by Chapman's candid explanation for not hiring Keating some time after the discharge of Ward. Chapman testified that he would not

rehire Ward or hire Keating because of their actual or possible pro-union sympathies. Drivers were told that, because of the certification application and unfair labour practice litigation, there would be no bonuses this year. In the circumstances, we are satisfied that employees who might be disposed to support the union could reasonably fear an employer reprisal; and faced with that possibility, we do not think that even a representation vote is likely to reveal their true wishes.

40. Pursuant to section 8 of the Act, the Board hereby certifies the applicant union as the exclusive bargaining agent for each of the bargaining units set out at paragraph 3 above.

41. Board directs that the grievor, Kevin Ward, be reinstated in employment, forthwith, and compensated for all wages and benefits lost as a result of his unlawful discharge. Such compensation shall include interest calculated in accordance with Practice Note 13.

42. The respondents are directed to cease and desist from interfering with the formation selection or administration of the union.

43. The respondent employer is directed to post copies of the attached notice marked "Appendix" after being duly signed by the respondent employer's representative, in conspicuous places where bargaining unit employees are employed in Markdale, Ontario, including all places where notices to employees are customarily posted, and to keep these notices posted for 60 consecutive working days. Reasonable steps shall be taken by the respondent to ensure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to two representatives of the complainant to satisfy itself that this posting requirement has been and is being complied with.

44. In our view these steps are necessary to dispel, at least in part, the likely impact on employees of the respondents' illegal conduct. In addition, copies of this notice must be distributed to each employee in the same manner as the bulletin referred to at paragraph 19 above.

## V

45. The final outstanding matter concerns the status of certain workers whose "employee status" is in dispute. A Board officer is hereby appointed to meet with the parties and attempt to effect a resolution of that issue. If there is no settlement, a formal appoint will be made to enquire into the duties and responsibilities of the disputed persons. This panel is not seized with that question.

### **DECISION OF BOARD MEMBER JAMES A. RONSON: June 26, 1990**

1. Having carefully reviewed my notes of the evidence in this case, I cannot agree with the inferences drawn and the conclusions made by the majority.

2. I accept the evidence of Mr. David Chapman that his decision to lay off the grievor was made absent any knowledge of the grievor's union activities. The decision was made at a time when the employer needed to cut costs, and went into effect following that stage at which the union campaign had come to a crunching halt for lack of support.

3. Mr. Chapman was frank in voicing his dislike of unions. But that fact, simply, does not taint his decision to lay off the grievor. Rather than impose upon the majority of employees a union that they do not want, I would dismiss this matter.

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## Labour Relations Act

**NOTICE TO EMPLOYEES****Posted by Order of the Ontario Labour Relations Board**

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT THREATEN OUR EMPLOYEES WITH LAY OFF OR DISCHARGE OR WITH ANY OTHER TYPE OF REPRISALS BECAUSE THEY HAVE SELECTED THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AS THEIR EXCLUSIVE BARGAINING REPRESENTATIVE.

WE WILL NOT REFUSE TO HIRE, REHIRE OR RECALL WORKERS BECAUSE THEY MAY WISH TO JOIN OR SUPPORT THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION.

WE WILL REINSTATE KEVIN WARD IN HIS EMPLOYMENT AND COMPENSATE HIM FOR ALL WAGES AND BENEFITS LOST AS A RESULT OF HIS DISCHARGE.

DAVID CHAPMAN'S ICECREAM LIMITED

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PER: (AUTHORIZED REPRESENTATIVE)

**This is an official notice of the Board and must not be removed or defaced.**

**This notice must remain posted for 60 consecutive working days.**

DATED this 26TH day of JUNE 1990



**3149-89-R** Labourers' International Union of North America, Local 1089, Applicant v. **Doug Chalmers Construction Limited**, Respondent v. Operative Plasterers' and Cement Masons International Association of the United States and Canada, Intervener #1 v. Local Union 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Intervener #2 v. The Provincial Conference of Ontario of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Intervener #3

**Bargaining Unit - Certification - Construction Industry - Labourers Union seeking to represent employees engaged in cement finishing and waterproofing - Labourers Union already holding bargaining rights with respect to construction labourers in the ICI sector who are not performing the work of cement finishers or cement masons - Appropriate unit consisting of all construction labourers except employees for whom bargaining rights were already held by the applicant - Clarity note indicating that unit including employees engaged in cement finishing and waterproofing**

**BEFORE:** *R. A. Furness*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

**APPEARANCES:** *S.B.D. Wahl* and *R. Leone* for the applicant; no one for the respondent; *N. L. Jesin*, *Marisa Pollock* and *M. Gannon* for the interveners.

**DECISION OF THE BOARD;** July 20, 1990

1. The name of the respondent appearing in the style of cause of this application is amended to read: "Doug Chalmers Construction Limited".
2. In a decision of a differently constituted panel of the Board dated April 12, 1990, the Board directed the taking of a pre-hearing representation vote in the following voting constituency:

all working foremen, journeymen and apprentice cement masons and waterproofers engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

The Board also directed that all ballots cast in the pre-hearing representation vote were to be segregated and not counted pending further direction from the Board. In that decision the Board also directed the Registrar to list this application for hearing on the description of the appropriate bargaining unit, including the related issue of whether the applicant already has bargaining rights for the employees affected by this application, and for the purpose of receiving the evidence and representations of the parties on all other matters arising out of or incidental to this application which were outstanding at the time of the hearing.

3. At the hearing before the present panel, the parties reached an accommodation with respect to the existence of bargaining rights. After entertaining the submissions of the parties, the Board ruled that having regard to the position of the parties with respect to claimed bargaining rights, the Board was prepared to hear arguments on the appropriate bargaining unit assuming the existence of the bargaining rights which have been asserted.

4. The issue before the Board is whether under section 144(1) of the *Labour Relations Act*, the applicant is obliged to apply for certification of only construction labourers or whether the

applicant may apply to displace a bargaining agent for what is arguably part of the designated trade. The Board has on many occasions considered displacement application involving local trade unions of the Labourers International Union of North America and the Operative Plasterers' and Cement Masons' International Association of the of the United States and Canada, see for example, *Duron Ottawa Ltd.*, [1980] OLRB Rep. Oct. 1386 and [1983] OLRB Rep. 1639. The last three lines of section 144(1) do not as a general matter refer to bargaining rights held by other trade unions but rather refer to bargaining rights already held by an applicant trade union. In the instant application for certification certain bargaining rights are already held with respect to construction labourers in the industrial, commercial and institutional sector of the construction industry who are not performing the work of cement finishers or cement masons.

5. Analogous circumstances were present in *The Georgian Building Corporation*, [1981] OLRB Rep. Mar. 275, where the Board held that it was not prepared to adopt a construction of section 144 which would preclude certification in respect of some employees who would not otherwise be beyond the purview of the certification procedures under the *Labour Relations Act*. In *Commonwealth Construction Company*, [1985] OLRB Rep. Dec. 1705, the Board rejected an argument that since an applicant trade union already had bargaining rights for some of the employees of an employer, who were bound by the provincial collective agreement to which the applicant was bound, it could not now seek certification for employees who would be bound by the provincial agreement for whom the applicant trade union did not then hold bargaining rights.

6. In *Gottcon Contractors Limited*, [1990] OLRB Rep. Jan. 25, the Board expressed its thinking with respect to adopting an interpretation of section 144 which could potentially leave the unrepresented segment of a trade unrepresented ad infinitum when it stated at page 39:

43. Moreover, if we were to adopt counsel's submissions that the Board has no jurisdiction to define the appropriate bargaining unit in the manner sought by the Labourers in this application, then we don't have such jurisdiction at any time. Yet, if we were to accept that the Labourers *must* apply for, and the Board can only grant, the Labourers its "standard" bargaining unit, it would lead, in our view to certain absurd and untenable results. To find that an A.B.A. cannot obtain bargaining rights for the unrepresented "part" or "sub-set" of the trade it is designated to represent because another trade union already holds bargaining rights for another "part" or "sub-set" of the trade would be disruptive of the scheme of province-wide bargaining in the ICI sector. The designation orders made by the Minister pursuant to section 139 of the Act are not watertight compartments. There are instances of an overlap in the designation orders themselves. Acceptance of counsel's submissions would mean that an A.B.A. which has been statutorily designated to represent a trade could never represent that trade if, for example, an employer voluntarily recognized another trade union. The same would be true if another A.B.A. whose designation order overlaps with the applicant A.B.A.'s designation order had already acquired bargaining rights for that part of the trade which it was also designated to represent. The race would always go to the swiftest. Voluntary recognition by an employer in respect of some "part" of the trade, or representation by another A.B.A. in respect of that overlapping part of the trade which it is also designated to represent would oust the right of an applicant A.B.A. to be certified on behalf of the remainder portion of the trade which was unrepresented and which it is statutorily designated to represent. That could potentially leave the unrepresented segment of the trade unrepresented ad infinitum.

The approach of the Board in that decision applied to what is essentially a disenfranchisement argument made by counsel for the intervener(s).

7. In seeking to represent employees engaged in cement finishing and waterproofing, the Board finds that the appropriate bargaining unit pursuant to section 144(1) of the *Labour Relations Act* is all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the County of Lambton, save and except non-working foremen, per-

sons above the rank of non-working foremen, employees for whom bargaining rights are already held by the applicant and/or any other affiliated bargaining agent of the designation of The Labourers' International Union of North America and The Labourers' International Union of North America Ontario Provincial District Council and employees covered by the subsisting collective agreement between the applicant and the respondent, constitute a unit of employees of the respondent appropriate for collective bargaining.

8. For the purposes of clarity, the Board declares that employees engaged in cement finishing and waterproofing are included in the bargaining unit.

9. The Board directs the Registrar to cause the ballot box to be opened and the ballots counted.

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**3196-89-U Roger Pryor et al, Complainants v. Local 6896 of the United Steelworkers of America, Respondent v. Cliffs of Canada Limited, Intervener**

**Duty of Fair Representation - Unfair Labour Practice - Union striking committee to negotiate mine closure agreement - Agreement signed without ratification vote - Whether union breached fair representation duty by not electing committee, not holding a ratification vote and not providing more information on pension formula - Union having little bargaining power because collective agreement in effect - No bad faith in way committee struck nor in lack of vote - Considerable efforts made to inform employees of contents of closure agreement after it had been signed - Complaint dismissed**

**BEFORE:** *Judith McCormack*, Vice-Chair.

**APPEARANCES:** *Roger Pryor and Darcy Reaume* for the complainants; *Michael Gottheil, Marcel Desjardins, Jim Bunclark and James Rae* for the respondent; *F. G. Hamilton and S. Bartle* for the intervener.

**DECISION OF THE BOARD;** July 12, 1990

1. On the consent of the parties, the respondent's name is amended to read: "Local 6896 of the United Steelworkers of America".

2. This is a complaint alleging that the respondent violated section 68 of the *Labour Relations Act* by failing to represent the complainants in a manner that was not arbitrary, discriminatory or involving bad faith. For the most part, the facts in this matter are not in dispute.

3. The complainants are employees of the intervener company which operates the Sherman and Adams Mines. The complainants were actually employed at the Adams Mine, where they were represented by the respondent and covered by a collective agreement with a term from March 1st, 1988 to April 25th, 1990. Employees at the Sherman Mine were represented by a sister local with their own collective agreement.

4. On March 6th, 1989 the company announced the permanent closure of both mines, effective March 31st, 1990. At the same time, it also proposed a preliminary severance and benefits



package for employees. A negotiating committee was then constituted from the two local union executives, with the addition of Marcel Desjardins, the union's staff representative, Leo Gerard, Regional Director of the union's District 6 and Hugh McKenzie, its Director of Research. Mr. McKenzie promptly embarked upon some preliminary research, including a survey of closure agreements in the iron ore industry. He also familiarized himself with the specific circumstances of the two locals, including the details of their collective agreements and pension plan. A series of meetings were set up between the committee and the company which took place over a period from March of 1989 to June of 1989. During these meetings, Mr. Gerard and Mr. Desjardins acted as spokespersons for the committee.

5. Over the course of these discussions, it became clear that the company was prepared to invest a considerable amount of money to obtain an orderly closure of the mines and to cushion the impact of the closure upon employees. In all, the company made available in excess of ten million dollars, which included surplus from the pension plan. During this period, the company also arranged for their actuary to meet with Mr. McKenzie so that the parties could jointly review the cost of a number of different benefit options, and consider the best allocation of available funds.

6. Throughout these meetings, the company had taken the position that they were merely consultation discussions, while the union treated them as conventional negotiations. However, because there were current collective agreements in existence at the mines, the union was not in a position to strike, and had little bargaining power. At the final meeting on June 27th, 1989, the union proposed the inclusion of a clause which would allow ratification of the agreement by employees. At that point, company representatives said that the agreement as it had developed to date was a "Cadillac plan", and that even if it was turned down by members there was no more. They told the union committee in no uncertain terms that they were not interested in any more "toing and froing" and that if the union insisted on ratification, the deal was off the table.

7. At that point, the union negotiating committee considered its position. Its members felt they had very little clout because they could not legally strike, and that if the proposed agreement was put to a vote of the general membership and turned down, there was not much they could do subsequently to improve its terms. They also tried to assess how far the union could push the company in these circumstances and how serious the company's threat was. In their view, the proposed agreement was a good one, and they were not prepared to risk calling the company's bluff and finding out that the deal had slipped through their fingers. In the end, they decided to sign the agreement without insisting on a ratification provision. The final agreement included a \$7.6 million upgrading of the pension plan, severance pay in amounts double those provided in the *Employment Standards Act*, a continuation of health care benefits for a specified period of time, a "no lay-off" commitment prior to the closure date, the maintenance of employees' current wage rates in the interim regardless of the actual job performed by the employee, relocation and retraining assistance, housing subsidies, community adjustment funds, a guarantee that any mine reclamation work would be performed by bargaining unit members, and so forth. Mr. McKenzie, who has been involved in negotiating a considerable number of closure agreements, testified that it was one of the best closure agreements he had seen.

8. Subsequently, two meetings were set up with bargaining unit members on July 3rd to inform them of the details of the closure agreement. These meetings were announced by notices posted on the union's bulletin boards at the mines. A copy of the agreement was handed out at the meetings and the union reviewed it in detail, explaining both its terms and the pension plan provisions. Union officials also told members that the company had made a commitment to have its actuary available for a number of meetings at different locations and times to meet with employees, to describe in more detail the wind-up benefits and to answer any questions they had with

respect to severance pay and pensions. These meetings were in fact held in early October, and they included extensive presentations by an actuarial consultant retained by the company, together with question periods. Prior to these meetings, employees received a preliminary statement of their benefits so that they would be in a position to ask questions about them.

9. The company also made arrangements to offer employees group registered savings plans and annuity purchase plans through a carrier on more favourable terms. It then scheduled group meetings and individual meetings for employees to discuss these arrangements. In addition, a toll-free telephone line was established to answer employees' questions. Employees also received a number of subsequent summaries and statements from the company describing their various benefits.

10. Roger Pryor was the only complainant to appear at the hearing. He was accompanied by Darcy Reaume, who testified on his behalf. At the outset, Mr. Pryor requested leave to amend the complaint to the effect that the only remedy requested was a declaration that the union had violated section 68. He also indicated that he was not challenging the details of the closure agreement itself, which he agreed was a good deal. Mr. Pryor and Mr. Reaume's concerns can be summarized as follows:

- (1) The union negotiating committee should have been elected.
- (2) Members should have been consulted during the negotiating process and the agreement should have been subject to ratification.
- (3) More information about the pension formula should have been available so that employees could check their individual benefit packages.

11. Section 68 provides as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

12. Turning first to the matter of ratification, the Board has held previously that a union is not required to hold a ratification vote even without respect to a proposed collective agreement (see *The T. Eaton Company Limited*, [1985] OLRB Rep. Aug. 1309 and *K-Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421). The *Labour Relations Act* provides only that if a ratification vote is held, it must be conducted in the manner prescribed by section 72(4) and (5). However, those sections confer no positive obligation to hold a ratification vote, and in any event are directed at the ratification of a proposed collective agreement or a strike vote. The closure agreement before me does not amount to either of these, and as a result, section 72 has no application.

13. However, this does not end the matter as the question before me is whether the decision not to hold a ratification vote was arbitrary, discriminatory or made in bad faith. Having reviewed the circumstances of that decision and the factors considered by the negotiating committee, I conclude that it was not. Because there was a collective agreement in operation, there was no legal obligation imposed by the *Labour Relations Act* on the company to negotiate at all with the union. The union was prohibited from striking for the same reason, and as a result, had little bargaining power. The committee knew that the proposed agreement was a good one, and the company made it clear that they would lose it if they insisted on ratification. The union knew that a ratification vote would be of little value in any event, since the union's options were extremely limited if the agreement was turned down by members. The evidence before me indicates that the union

carefully assessed the company's posture, and decided that it could not risk losing an agreement worth ten million dollars in these circumstances. There was nothing arbitrary, discriminatory or suggestive of bad faith in that decision. On the contrary, the union's decision was eminently reasonable and was made in the best interests of all employees, including the complainants. Indeed, Mr. Pryor conceded that he himself would have chosen the agreement over a ratification vote in these circumstances, although he felt the union should not have allowed itself to be put in such a corner. However, if, as it appears, the company was determined to avoid a ratification vote, it is difficult to know what the union could have done to prevent this scenario from arising in one form or another, or at one stage or another.

14. With respect to Mr. Pryor's view that the negotiating committee should have been elected, I find no wrongdoing on the part of the union in this respect. It was apparent that the union wished to respond quickly to the closure announcement. Indeed, Mr. McKenzie set to work within hours of the union receiving notice of the closure. The negotiating committee was comprised of elected officials from both locals, together with Mr. Gerard, who is himself an elected official, and both Mr. Desjardins and Mr. McKenzie who are union staff members. There is nothing about the composition of the committee which suggests any hint of impropriety, and I cannot conclude that there was any obligation to elect the committee. As the Board pointed out in *K-Mart Distribution Centre, supra*, the Act does not purport to regulate union democracy per se, and in any event democratic principles do not necessarily require elected officials to hold other votes on specific matters, or in this case, for particular committees:

33. It is argued by the complainants that the union's conduct was "undemocratic" and thus contrary to section 68. There are several answers to this submission. First the Act does not purport to regular internal union democracy per se - perhaps in recognition of the fact that a union is a "fighting organization" and may have its effectiveness as a collective bargaining mechanism impaired if its officers were regarded as "delegates" rather than "representatives" of the employees in the unit. Secondly, the reference to democracy is not really very helpful. Not only does it ignore the special collective bargaining context but even in "democratic" institutions such as the Legislature or Parliament, once representatives are elected they are left to vote as they wish or enact laws even though a majority of their constituents may not agree with their position. The remedy is at the ballot box, or in the present context, through a termination application.

In this case, where the members of the committee acted in good faith and in the interests of the bargaining unit, the fact that the negotiating committee was not elected was of no consequence.

15. The union might well have been wiser to have kept its members better informed as negotiations progressed. However, given that the consent or approval of members with respect to the agreement was not required, I do not find that the union's failure to do so constituted any kind of wrongdoing. I note as well that between the company and the union, considerable efforts were made to inform employees of the contents and impact of the closure agreement after the agreement was signed. There was no evidence that the paucity of information available to members before this point was motivated by any improper considerations.

16. Finally, the general outlines for the pension plan formula were made available to employees through the material distributed by the company and the union. In addition, meetings for employees were scheduled with the actuary retained by the company to answer their questions about the pension plan. Mr. Pryor did not attend any of these meetings, nor did he utilize the toll-free telephone line. Indeed, I am not convinced that Mr. Pryor requested the additional information that he wished to have at any time prior to these proceedings, although others may have done so. In these circumstances, where Mr. Pryor did not avail himself of the methods provided for obtaining information about the pension plan, I am not prepared to conclude that the union's con-



duct was remiss in any way. In any event, I find the information already provided to members to be sufficient for the union to have met the standard set up by section 68.

17. For all these reasons, this complaint is dismissed.

18. It became clear in the course of the hearing that what Mr. Pryor and Mr. Reaume were requesting was more detailed information with respect to the actuarial assumptions and other more specific data used to calculate the pension benefits for individual employees. If the union chooses to do so, I note that there is nothing to prevent it from volunteering to Mr. Pryor and Mr. Reaume such information of this nature as may be readily available to it at this point.

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**1767-87-R United Food and Commercial Workers International Union, Locals 175 & 633, Applicant v. Miracle Food Mart, a Division of Steinberg Inc. and 722686 Ontario Limited, c.o.b. Ferlisi Supermarkets, Respondents**

**Sale of a Business - Steinberg leasing store in mall - Owner of mall taking over lease and chattels - Ethnic supermarket leasing premises from owner and buying unwanted chattels - Whether sale of a business from Steinberg to ethnic supermarket - Ethnic supermarket's food business not a continuation of the business formerly operated by Steinberg but an expansion of a pre-existing retail food business - Application dismissed**

**BEFORE:** *R. A. Furness*, Vice-Chair, and Board Members *W. A. Correll* and *R. R. Montague*.

**APPEARANCES:** *Harold F. Caley* and *Wayne Hanley* for the applicant; *D. Brent Labord* and *John Peardon* for Miracle Food Mart, a Division of Steinberg Inc., *J. Paul Wearing* and *Dino Ferlisi* for 722686 Ontario Limited, c.o.b. Ferlisi Supermarkets.

**DECISION OF THE BOARD;** June 20, 1990

1. The name of one of the respondents appearing in the style of cause as "Ferlisi Bros." is amended to read: "722686 Ontario Limited, c.o.b. Ferlisi Supermarkets".

2. The applicant has filed an application under section 63 of the *Labour Relations Act* with respect to its bargaining rights as a result of an alleged sale of a business by Miracle Food Mart, a Division of Steinberg Inc. ("Steinberg") to 722686 Ontario Limited, c.o.b. Ferlisi Supermarkets ("Ferlisi") which is alleged to have taken place on or about September 8, 1987. It is the position of the applicant that as a result of the alleged sale Ferlisi is bound to a collective agreement between the applicant and Steinberg, that a change in the character of the business so that it is substantially different from the business of the predecessor business has not taken place and that an intermingling of employees of one business with employees of another business represented by a trade union has not taken place. The applicant has requested a declaration that Ferlisi is bound by the collective agreement and such other relief as the Board considers appropriate.

3. In the application, the applicant stated that a Miracle [Steinberg] store was operated at 2699 Jane Street, Downsview, and that it closed on or about June 27, 1987. It is also stated that on or about September 8, 1987, Ferlisi opened a food store at the same location using most of the

equipment formerly used at this location by Miracle. The applicant further stated that given the location, the nature of the business and the transfer of assets a sale of a business has occurred.

4. In its reply Miracle [Steinberg] stated that on or about February 15, 1966, it commenced operations as a retail food store at 2699 Jane Street, Downsview, that while operating at this location it was a party to a province-wide collective agreement with the applicant which covered this store and that on or about June 30, 1987, it ceased operations at 2699 Jane Street, Downsview.

5. In its reply Ferlisi stated that there had not been a sale of a business by Miracle [Steinberg] to Ferlisi. In Schedule "A" to its reply Ferlisi stated as follows:

1. Ferlisi Supermarkets have operated in the food retail business in Metropolitan Toronto for thirty years.
2. Prior to acquiring the Jane and Sheppard Plaza location, there were four stores in the chain.
3. The acquisition of the Jane and Sheppard Plaza location was an expansion of the Ferlisi Supermarkets food retail business. The store was acquired through negotiations between a member of the Ferlisi family and the landlord, Samuel David Borins in early June, 1987.
4. At the time of the aforesaid negotiations the landlord had terminated the lease with the then tenant, Steinberg Inc. (Miracle Food Mart Supermarket).
5. The store opened as Ferlisi Supermarkets on September 9th, 1987.
6. The Respondent, Ferlisi Supermarkets, purchased some equipment from the landlord.
7. Additional equipment was purchased from other sources and approximately \$200,000.00 was spent in renovations of the store.
8. The Respondent, Ferlisi Supermarkets, has no connection with Steinberg Inc. or Miracle Food Mart, but rather it is a family business catering to the ethnic food shopper in Metropolitan Toronto.

6. Steinberg called John Peardon, its director of labour relations as a witness. Ferlisi called two witnesses, Samuel David Borins and Dino Ferlisi. Mr. Borins is a lawyer with business interests in real estate. Mr. Ferlisi is the president of Ferlisi and has twenty years' experience in the retail food business. The applicant did not call any witnesses. This panel of the Board, on the invitation of and in the presence of the parties visited the premises at 2699 Jane Street, Downsview and other stores of the respondents in order to better understand the evidence in this application.

7. This application arises out of a change in the lessee of a supermarket at 2699 Jane Street in a mall (the "demised premises"). It is helpful to briefly outline the series of real estate transactions from the time of the construction of the mall in 1965. In December of 1965 Sylwaks Investment Limited and Manston Construction Limited carrying on business under the firm name and style of Adams and Waks Construction Company leased the demised premises to Steinberg's Limited ("Steinberg") for a period of twenty-five years commencing on March 1, 1966, or on the date on which Steinberg carried on business in the demised premises, whichever date should later occur. The lease also provided for Steinberg to have the option to renew for four consecutive terms of five years each. This provision could have extended the operation of the lease until 2011. The yearly rent was \$41,381.46 calculated at the rate of one dollar and ninety cents per square foot of the ground floor area and one dollar per square foot for the mezzanine floor space. The lease also provided for Steinberg to have the right to prohibit, with certain limited exceptions, the use of the mall by tenants of stores which in Steinberg's sole opinion might be considered as competitive with Steinberg's own business. In 1967 Mr. Borins acquired title to the mall (including the demised

premises). In time, the rent payable and the prohibitions in the lease were to form some of a number of unhappy differences between Mr. Borins and Steinberg. Mr. Borins considered the lease to be very onerous from his point of view. He estimated the market value of the demised premises to be about thirteen dollars a square foot compared with less than two dollars a square foot which he was receiving from Steinberg. Mr. Borins also believed that Steinberg could have been more reasonable in exercising its right to prohibit the use of the mall by tenants who were viewed by Steinberg as competitors. Steinberg frequently exercised this right under the lease. This in turn gave rise to vacant stores. Mr. Borins found Steinberg very difficult to deal with. From Mr. Borins' point of view, he found Steinberg to be a far from satisfactory tenant. He introduced into evidence photographs and referred to various matters which he found to be objectionable. These included poor or absent signage, unstocked shelves, packing cases and material littering the aisles, rusting refrigerator unit, holes in walls, litter on floors and floors which required repairs. In addition, Mr. Borins objected to the manner of the delivery of stock to the demised premises and to the presence of shopping carts in the area adjacent to the demised premises at the south entrance of the demised premises. He barred the double doors' access into the mall from the demised premises. On April 9, 1986, Steinberg launched an action against Mr. Borins in the Supreme Court of Ontario seeking various declarations, injunctions, damages and costs. Mr. Borins defended and counter-claimed.

8. While this action was in its pre-trial stages, a third party entered the picture. After an initial telephone call Mr. Borins received a visit from a Jerry Sprackman during the early months of 1987. Mr. Sprackman advised Mr. Borins that he wished to purchase his mall. Mr. Borins advised him that the mall was not for sale. Mr. Sprackman then proposed a joint venture with the purpose of installing a Hy and Zel's drug store in the demised premises. Mr. Borins stated that he would consider it but felt he had no interest in such a store. Mr. Sprackman informed Mr. Borins that he was a director and a large shareholder in Hy and Zel's and that he was also acting on behalf of Landawn Shopping Centres (National) Limited ("Landawn"). Mr. Sprackman subsequently informed Mr. Borins that he had an assignment of Steinberg's lease in his case. When Mr. Borins asked to see this document he was informed that it was not available at that time but that he would let him have it. Mr. Borins informed Mr. Sprackman that he would not proceed without seeing the document. Some weeks later after many excuses Mr. Borins received a copy of this document. This document was a sublease and was conditional upon the consent of Mr. Borins. However, Mr. Borins had not given his consent to Steinberg. It was clear from the evidence of Mr. Borins that this was an unwanted complication and a potential obstacle to his aspiration of gaining possession of the demised premises and so leasing the demised premises and the stores in the mall so as to realize their undoubted commercial potential. Throughout the contacts with Mr. Sprackman, Mr. Borins insisted upon dealing with Steinberg. Mr. Borins had always found Steinberg very difficult to deal with. However, eventually in May of 1987 the lawyers for Steinberg, Mr. Borins and Landawn entered into negotiations. The outcome of these negotiations was that Mr. Borins obtained a surrender of the lease on the demised premises from Steinberg, there was a mutual release of actions in the Supreme Court of Ontario by Steinberg and Mr. Borins, a termination of the alternative arrangement contemplated between Landawn and Steinberg and Mr. Borins produced a cheque to his lawyers in the amount of half a million dollars. Of this sum of money, one hundred and fifty thousand dollars was received by Landawn for its involvement in the dealings between Mr. Borins and Steinberg. The remaining three hundred and fifty thousand dollars was retained by Steinberg as the price for the unwanted chattels, equipment and improvements of Steinberg in the demised premises. At this time Mr. Borins had no clear idea of what he would do with the demised premises. However, in order to achieve his objective Mr. Borins was obliged to pay Steinberg for chattels and equipment for which Steinberg said was too difficult to provide an inventory.

9. Ferlisi is a family business of what was referred to during the hearing as an operator of ethnic supermarkets in the retail food business. Mr. Ferlisi's father, uncle, cousin, sister and broth-



ers are involved in the family business. At the time of the hearing, Ferlisi operated six supermarkets within the approximate rectangle contained within the intersections of Highway 10, Dufferin Street, Highway 7 and St. Clair Avenue. These supermarkets are located at 950 Albion Road, 666 Burnhamthorpe Road, 680 Silvercreek Boulevard, 3932 Keele Street, 2024 Eglinton Avenue West and 2699 Jane Street. Ferlisi has been in business for approximately thirty years and commenced operations with a very small store on Dundas Street and then moved northwards to a store at Bloor and Lansdowne in order to follow the northerly movement of the ethnic populations of Italian and Portuguese that it serves at these six locations. Ferlisi's major competitors are Valencia Foods, Galati Brothers and Weston Produce.

10. Ferlisi considers the Italian and Portuguese communities to be the market it primarily desires to reach. To this end it advertises on radio in the Italian and Portuguese languages. The commercial spots for Ferlisi are broadcast in Italian on radio station CHIN and in the Portuguese language on Portuguese Voice during a programme by Father Luna who has a large following in the Portuguese community on Radio Sol de Portugal. In addition Ferlisi advertises extensively in Italian in a newspaper called *Corriere Canadese*. While Ferlisi does not advertise in the Toronto based newspapers *The Globe and Mail*, *The Toronto Sun* and *The Toronto Star*, it does distribute about sixty thousand flyers each month advertising its products and specials in the English language in its trading area. Steinberg does not advertise in the ethnic press.

11. Ferlisi focuses its merchandising on the tastes and expectations of the ethnic community it serves. For example, in the area of the merchandising of meat, Ferlisi offers meat which is freshly cut on its premises. Moreover, the carcasses and the process of butchering are visible to the customers in mirrors or through glass windows. While the meat department has a wide selection of veal as a reflection of the tastes of its customers, Ferlisi's meat department also offers a wide variety of meat products such as beef and calf lungs, whole rabbits, pigeons and goat. Reference was also made in the evidence to the similarities and differences between Ferlisi and Steinberg or other major chain food supermarkets. Ferlisi and Steinberg each have departments for fresh produce, grocery, meat, dairy and delicatessen products and both offer for sale the standard products which are consumed in a typical household. However, it was emphasized that Ferlisi offered a rich mix of products for the ethnic palate which are not offered by Miracle. Products which were referred to included squid sauce, octopus in oil, imported European canned tuna, espresso coffees, olive oils, imported Italian tomatoes, imported Italian confectionery and cookies, imported Italian cheeses and processed Italian meats, pizza dough and Italian breads and buns. Ferlisi placed great emphasis on the fact that it offers a wide selection of pasta and olive oils. It was the unchallenged testimony of Mr. Ferlisi that Ferlisi offered a great variety of pasta products which occupied about forty feet of shelf space in the demised premises in contrast to eight feet of shelf space by Steinberg. Ferlisi offers fifteen or sixteen different labels of olive oil in contrast to two or three by Steinberg. It was also the testimony of Mr. Ferlisi that its fresh produce was fresher than a major chain food supermarket such as Steinberg because such produce came directly to its stores from the Ontario Food Terminal or the producer without being initially stored in a warehouse. Mr. Ferlisi also informed the Board that Ferlisi's garden centre was much larger than Steinberg's and that Ferlisi offered grapes for wine-making and wine-making equipment for sale while Steinberg did not offer these items for sale. During the season from September through November of 1987, Ferlisi sold from the demised premises twelve different types of wine grapes for an aggregate total of 15,152 cases. For an additional charge Ferlisi will press on the demised premises any grapes which have been purchased. The department managers at Ferlisi have more flexibility than their counterparts in Steinberg in that they can order from Ferlisi's warehouse or a supplier anything they think they can sell.

12. Mr. Ferlisi never had any direct or indirect contact with Steinberg. He first became

aware of the availability of the demised premises when a real estate agent named Ben Hunn telephoned him in April or May of 1987 and said that the demised premises might be available. Mr. Hunn had apparently been working on a deal with Mr. Sprackman before it fell through. Mr. Ferlisi telephoned Mr. Borins towards the end of May and met him for negotiations in the latter's office early in June. Mr. Borins had received a number of telephone calls about the demised premises including inquiries from competitors of Ferlisi. Mr. Ferlisi was aware that Valencia Foods had a store across the street from the demised premises and that the store was apparently not only profitable but was doing very well. Mr. Ferlisi feared loss of market share if the demised premises were to be leased to a competitor and on the other hand he saw an opportunity to take business away from Valencia Foods.

13. Mr. Borins was favourably impressed by the manner in which Ferlisi conducted its business and maintained its stores and, after a credit check and a conference by the Ferlisi family, terms for obtaining a lease of the demised premises were agreed to between Mr. Borins and Ferlisi. On June 15, 1987, Mr. Borins and Ferlisi entered into a lease for the demised premises. The lease is for an initial period of slightly more than four years with an option for Ferlisi to renew the lease for a further period of five years. In addition the lease provided for a percentage rent and Mr. Borins was able to realize his expectation of the demised premises in yielding to him thirteen dollars a square foot. As part of obtaining the lease, Mr. Borins successfully insisted that Ferlisi take the chattels, equipment and improvements which he had been obliged to purchase from Steinberg. Ferlisi paid two hundred thousand dollars for the chattels, equipment and improvements with half of the amount in cash secured by a promissory note and a chattel mortgage for the other half of the amount.

14. Steinberg closed its store in the demised premises on June 27, 1987, and was allowed under an agreement with Mr. Borins to retain possession of the demised premises until July 11, 1987. In advising its customers of the closing of the demised premises on June 27, 1987, Steinberg placed a sign in its window and invited its customers to visit nearby Miracle stores at 2200 Jane Street (at Wilson); 1090 Wilson Avenue (at Keele) and 2592 Finch Avenue West (near Islington). The lease between Mr. Borins and Ferlisi commenced on July 13, 1987. However, the lease provided that no minimum rent was to be paid for the period from July 13 to August 31, 1987. Ferlisi took possession of the demised premises between July 13 and 15, 1987, and opened for business on September 9, 1987. During the period from mid-July until September 9, 1987, Ferlisi made significant changes in the demised premises. Approximately two hundred and fifty thousand dollars were spent by Ferlisi in renovating and decorating the demised premises. Much of the equipment purchased from Mr. Borins was unsuitable in its type of operations. The meat department was enlarged. Sixty feet of Miracle's self-service meat counter ended up in the garbage and was replaced by a new counter seventy-two feet in length. The cash registers and scales were replaced and one of the aisles was completely eliminated with a consequent enlargement of the fresh produce department. The number of check out counters was increased. The L-shaped shelving used by Miracle was eliminated and replaced with straight line shelving. This in turn enabled Ferlisi to engage in its preferred method of merchandizing by having mass displays at the front and rear end of each aisle. The twenty-four feet delicatessen counter used by Miracle was replaced by thirty-six feet service counter and a large walk-in box was built for the fresh produce. The new signage which was erected is in English.

15. Under the terms of the collective agreement binding on Steinberg and the applicant, the full-time employees of Steinberg were offered the opportunity to exercise bumping rights into other stores in Ontario. All of these full-time employees were subsequently employed in other stores in Ontario. The part-time employees have under the collective agreement the right to move to neighbouring stores. Some of these part-time employees exercised these rights. None of the for-



mer employees of Steinberg became employees of Ferlisi. The staff at the demised premises were hired after advertisements appeared in *Corriere Canadese*. Of the fifty full-time and part-time employees employed by Ferlisi at the demised premises forty-six are bilingual, almost exclusively Italian and English. The remaining four employees speak only English.

16. Section 63 provides for the preservation of collective bargaining and the rights of employees under a collective agreement when there has been a change in the ownership in a business. See *Valencia Foods*, [1984] OLRB Rep. May 773. In determining whether there has been a sale of a business, the Board has been more concerned with the substance of a transaction rather than the legal form. See, for example, *Aircraft Metal Specialties Ltd.*, [1970] OLRB Rep. Sept. 702. The Board has interpreted the meaning to be attached to the word “business” in section 63 on a case by case basis. However in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193 the Board suggested an approach in interpreting the word “business” when it stated at page 1205, para. 30:

A business is a combination of physical assets and human initiative. In the sense, it is more than the sum of its parts. It is a dynamic activity, a “group concern”, something which is “carried on”. A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a “business” from an idle collection of assets....

17. An overview of the transactions in this application reveals an unhappy landlord bound by an onerous lease and having commercial differences with a tenant. The tenant in turn, despite enjoying a very favourable lease, was apparently unable to conduct a profitable business in the demised premises. The equilibrium of the unhappy landlord and tenant relationship was disturbed by the intervention of a third party. As part of the consideration for the surrender of the lease the landlord was obliged, *inter alia*, to pay three hundred and fifty thousand for idle and unwanted assets. This transaction was completed before the potential new tenant arrived on the scene. At the time of the surrender of the lease the landlord did not know who would be the new tenant or precisely the type of business which would be carried on in the demised premises. Had the personalities and circumstances been different there might have been a Hy and Zel’s or similar store in the demised premises. However, at it happened, the new tenant was also engaged in the retail food business. There was no contact between the former tenant and the new tenant. It was the unchallenged testimony of Mr. Borins that it was not possible to sell the chattels and equipment separately. Quite clearly the landlord was obliged to purchase the chattels, equipment and improvements from the former tenant. However, the landlord had sufficient leverage to recover two hundred thousand dollars by insisting that the new tenant purchase the chattels, equipment and improvements. The new tenant made the purchase reluctantly. It was really a situation where idle and unwanted assets were in search of an owner.

18. In *Steinberg Inc.*, [1989] OLRB Rep. Oct. 1066, there were a number of facts which were similar to the facts in the instant application. That case did not involve a mainline retail food supermarket being transformed into an ethnic retail food supermarket. As in the instant application, the Board concluded that there was no evidence that Steinberg at any time sought to find a buyer for its business or that any of the intermediaries acted to find a buyer for Steinberg’s business. However, unlike the instant application, Steinberg withdrew from operating retail food supermarkets in an urban area with its closest remaining stores located several kilometres distant. In addition, in that case the Board concluded that there was no evidence which suggested that Steinberg’s surrender of its rights to the use of the store was made conditional on the sale of assets to anyone let alone the new operator of the retail food supermarket. In the instant application, Steinberg did obtain a sum of money and so did a third party when equipment changed hands upon the surrender of a lease which was highly prized by Mr. Borins. The facts in that case were on the



whole more favourable to the applicant therein than are the facts in the instant application favourable to the applicant. However, the Board concluded in that case that there had not been a sale of a business.

19. Ferlisi entered the scene with a history of thirty years in a segment of the retail food industry in selling to ethnic communities. In this period of time it had founded, developed and expanded its business. In May of 1987 Ferlisi was made aware of an opportunity to lease the demised premises. From Ferlisi's point of view the demised premises were very attractive for various reasons. Firstly, the demised premises were situated in the geographic area of the Italian community and had adequate parking facilities. Secondly, there was the opportunity to take away business from a competitor with the concomitant inability to do this if Ferlisi failed to obtain a lease. The fact that Steinberg had previously been the tenant or the existence of the idle and unwanted assets played no part in the decision to sign a lease with respect to the demised premises. There is nothing before the Board which indicates any nexus between Steinberg and Ferlisi.

20. In support of its position that there had been a sale of a business, the applicant relied on the fact that the demised premises had been used as a food supermarket by Steinberg and by Ferlisi and also upon the assertion that its counsel could quite well do his shopping there. The first point was canvassed by the Board in *Valencia Foods, supra*, where it was concluded that the lesson of the cases is that while location and premises are important elements of a retail food business, they are not themselves the business and that even location and premises can be or become mere surplus assets which alone, or been in combination with other assets, can lack the dynamic or organic quality which distinguishes a business from an idle collection of assets. See also *Sunnybrook Food Market (Keele) Limited*, [1974] OLRB Rep. Jan. 47 and *More Grocerteria Limited*, [1980] OLRB Rep. Apr. 486. Similarly, where there is the added fact that a mainline retail food operation has become a new operation targeted to a specific ethnic community, the "location equals patronage" analysis has been rejected by the Board. See *Miracle Food Mart, Steinberg Inc.* [1988] OLRB Rep. July 679. The second point does not help the applicant in our view. The possibility that many of the customers for Ferlisi store in the demised premises might have been customers at the former Miracle store does not mean in itself that the business was transferred. Where services are comparable customers may well shop at the most convenient retail food business. This does not mean that the business has been continued or transferred. See *New Dominion Stores*, [1989] OLRB Rep. May 473. The Board notes that in this application Steinberg has invited its customers to visit its three stores in its trading area. It appears that Steinberg is endeavouring to retain the business and patronage of its customers.

21. There is no dispute that Steinberg and Ferlisi each operated a retail food operation or business in the demised premises. Was the business or part of the business of Steinberg sold to Ferlisi within the meaning of section 63 of the *Labour Relations Act*? As the Board concluded in *Grand Valley Ready - Mixed Concrete Supply Limited*, [1981] OLRB Rep. June 663, if the transaction is one carried out in connection with the operation of the parallel business and if the business entity which results can more properly be described as having its roots in the alleged successor's business than in the alleged predecessor's business, it is unlikely that a sale of a business within the meaning of section 63 had taken place. In our opinion, the roots of Ferlisi's existing business are clearly not in the business of Steinberg. We have no hesitation in concluding that Ferlisi's retail food business in the demised premises at 2699 Jane Street is not a continuation of the business formerly operated by Steinberg but is rather an expansion of Ferlisi's own pre-existing retail food business.

22. For the foregoing reasons, this application is dismissed.

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**1098-89-G International Association of Bridge, Structural & Ornamental Ironworkers Local Union 786, Applicant v. Stone & Webster Canada Limited, Respondent**

Construction Industry - Construction Industry Grievance - Discharge - Union grieving respondent's refusal to hire two rodmen - Rodmen had been discharged in 1985 by respondent for intoxication - Neither employee had grieved discharge - Board finding that respondent acted unreasonably in refusing to re-hire rodmen - Respondent had failed to notify rodmen at time of discharge in 1985 that they were not eligible for re-hire

**BEFORE:** *Inge M. Stamp*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballentine*.

**APPEARANCES:** *Elizabeth Mitchell*, *Daniel Girard*, *Andrew Beith* and *Terry Smith* for the applicant; *Mark Contini* and *Don Muio* for the respondent.

**DECISION OF THE BOARD;** July 9, 1990

1. This is a referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act*.
2. The applicant is grieving the respondent's refusal to hire Andy Beith and Terry Smith alleging violation of Article 2(a) of the collective agreement. The company contends that due to the grievors' being discharged for cause in 1985 it was entitled to refuse to hire them.
3. The applicant submits that by relying on a 1985 discharge in 1989 the employer's position is unreasonable, arbitrary and in bad faith.
4. The parties submitted an agreed statement of facts as follows:

AGREED STATEMENT OF FACTS

1. Stone & Webster Canada Limited ("the Company") is a construction contractor that has carried on business for a number of years at the Algoma Steel Corporation Limited plant site in Sault Ste. Marie Ontario.
2. The Company and the International Association of Bridge, Structural and Ornamental Ironworkers, Local 786 ("the Union") are bound to the current provincial collective agreement between the Rodmen Employer Bargaining Agency and the Rodmen Employee Bargaining Agency, a copy of which has been filed with the Board.
3. The Company and the Union were bound to the Rodmen Provincial Agreement covering the period May 1, 1984 to April 30, 1986 and the Rodmen Provincial Agreement covering the period May 1, 1986 to April 30, 1988 in Sault Ste. Marie.
4. The Company is a major employer of rodmen in Sault Ste. Marie and, on average, employs approximately 60% of the Union's rodmen.
5. The Grievor, Terrance Smith ("Smith") was referred by the Union to the

Company and was employed by the Company at its Algoma Steel site from April 22, 1985 to August 7, 1985. On August 7, 1985 Smith was discharged for reporting to work "under the influence of alcohol" and for "other previous violations" (see exhibit 1 attached). No grievance was filed contesting the discharge of Smith.

6. The Grievor, Andrew Beith ("Beith") was referred by the Union to the Company and was employed by the Company at its Algoma Steel site from June 25, 1985 to August 7, 1985. On August 7, 1985 Beith was discharged for reporting to work "under the influence of alcohol" and for "other previous violations" (see exhibit 2 attached). No grievance was filed contesting the discharge of Beith.

7. Prior to their discharges, each of the grievors had received two written warnings from the Company. On July 24, 1985 each was warned for going in an off-limits area during work hours (see exhibits 3 and 4 attached). On July 17, 1985 each was warned about leaving the work site early (see exhibits 5 and 6).

8. Neither Beith nor Smith were again referred to the Company for employment until May 15, 1989. On May 15, 1989, Beith and Smith were referred by the Union to the Company for employment at the Algoma Steel site. However, the Company refused to hire Beith and Smith because of their record of misconduct and discharge in August of 1985.

9. On May 19, 1989, a grievance was filed by the Union as a result of the Company's refusal to employ Beith and Smith (exhibit 7). The grievance was responded to by the Company on May 17th, 1989 (exhibits 8 and 9). the matter was not settled during the grievance procedure and the grievance was then referred to the Ontario Labour Relations Board pursuant to section 124 of the *Labour Relations Act* by the Union on July 27, 1989. The original hearing of August 9, 1989, was adjourned at the request of the Respondent and on agreement of the parties.

The Company agrees to accept that these statements were made by the authors of the letters indicated. The Company will not require the said authors to attend at the hearing to give evidence confirming that these letters reflect the true beliefs of these authors.

10. The Company and the Union agree that the Board should remain seized of this matter with respect to any issue of damages, compensation or other remedial relief. Should it become necessary for the Board to deal with such issues, the Company and the Union agree that a further hearing should be convened at which time other evidence relevant to these issues may be brought forward.

DATED at Toronto this 15th day of November, 1989.

"Illegible"  
For the Union

"Don Muio"  
For the Company

5. Article 2(a) of the collective agreement reads as follows:



**ARTICLE 2**  
**UNION SECURITY**

- (a) As a condition of employment, it is agreed that only members of the International Association of Bridge, Structural and Ornamental Iron Workers shall be employed on work coming within the Scope of the Agreement. All Employees shall keep up to date with their dues and assessments. The Employer agrees to only hire Employees who present referral slips issued by the Local Union in whose territory the work is being performed. Local members who solicit their own jobs may be requested by the Company. These members must present a written request to the Union who will issue them a referral slip. This right to request shall not be abused. The Company also agrees to hire unemployed members off the out-of-work lists of the Unions. Employee members who are transferred within the territory of their Local Union by an Employer will not require an additional referral slip. However, such transfer will not result in lay-offs of Employee members presently on these projects.

6. Andy Beith has been a rodman since 1980. Beith gave evidence surrounding the August 7, 1985 discharge suggesting that the problem that day involved "brassing" in late. He agreed he did have "four or five beers" before coming to work, but that the night general foreman did not say anything about being drunk or being fired. Beith was not advised at the time of termination that he was not eligible for rehire at Stone & Webster.

7. Beith had been employed by the company previously in 1982 and had been discharged. His reasons for not filing a grievance in 1985 was that he understood the Business Agent would look after it. Beith went to work in Toronto the day following the discharge in 1985. On the day of hearing (November 15, 1989) Beith was employed with St. Mary's Paper in Sault Ste. Marie. From 1987 until mid July 1989 Beith was employed by Harris Rebar, both as a rodman and foreman. He has worked for Northern Reinforcing as general foreman at a shut-down in Algoma Steel supervising 28 men at peak. Beith has been working away from home for 1½ years travelling home every weekend. When an open call from Stone & Webster for rodmen came in to the hall, Beith got a referral slip to go to work. He was refused employment. Beith returned to work as foreman for Harris Rebar in Thunder Bay. Beith took the opportunity to work at home on a shut-down and returned to Harris Rebar after completion of the work at Algoma. It appears he has worked without any further suspensions, terminations or warnings apart from safety infractions.

8. Terry Smith has been a rodman since 1979. He had been continuously employed until laid off by Stone & Webster in 1982 and was rehired in 1985. Smith went to work in Toronto after being terminated in 1985. He had a number of jobs and was on compensation at one time. He did not work as a rodman for a period of time and was reinstated in the union in January of 1989. Smith got a referral to go to Stone & Webster and when he was refused employment he instructed the union to file a grievance. Smith was unemployed from May 15 to July 1 when he went to work with Northern Reinforcing at Algoma Steel. He broke his ankle and was off work until three weeks prior to the hearing when he went to work for Northern Steel at Algoma where he is presently employed. His evidence is that he has not been discharged or disciplined on the other jobs, nor did he receive any written warnings. He was not told in 1985 that he was not eligible for rehire.

9. Exhibits 8 & 9 are identical letters dated May 17, 1989 sent to the applicant re Beith and Smith which read as follows:

May 17, 1989

International Assoc. of Bridge, Structural  
and Ornamental Ironworkers, Local 786,  
30 Durham St. N., Suite 311,  
Sudbury, Ontario.  
P3C 5E4.

Att'n: Mr. Daniel Girard

Re: MR. T. SMITH      (MR. A. BEITH)

Dear Sir:

At our meeting on May 15, 1989, I indicated Stone & Webster was not interested in the re-hire of Mr. Smith (Beith). You, in turn, asked that we reconsider our position.

Accordingly, I have reviewed our records and must advise that Stone & Webster will not offer employment to Mr. Smith (Beith) at this time.

However, Stone & Webster would be prepared to reconsider its position should Mr. Smith (Beith) be able to factually present a changed attitude and a demonstrated commitment to work.

Thank you,

STONE & WEBSTER CANADA LIMITED

"Don Muio"

GENERAL SUPERVISOR, EMPLOYEE RELATIONS

### Argument

10. Counsel for the applicant contends that the employer blacklisted the grievors based on a 1985 incident. The 1985 discharge was not of such a nature as to threaten the employer's business interests. The letters of May 17 are in bad faith making an offer to reconsider and then not reconsidering. The respondent has not acted reasonably and in good faith and without discrimination when it refused to hire the grievors. (See paragraph 38 of *Ontario Hydro*, [1983] OLRB Rep. Jan. 99.) What distinguishes *Ontario Hydro*, *supra*, from this case is that the grievors here are being disciplined twice, once in 1985 and again in 1989. Since Stone & Webster employs 60% of the local rodmen, a refusal to be hired is not insignificant. They are forced to work out of town for extended periods of time. Article 24, the Management Rights Clause, contains similar language to that found in the *Ontario Hydro* hiring hall provision. The applicant contends that the employer is breaching the test set out in *Ontario Hydro*. It is unreasonable to rely exclusively on the discharges in 1985 in refusing to hire the grievors in 1989.

11. The collective agreement does not allow unbridled discretion to the employer. Its decision has to be reasonable. The fact of the discharge in 1985 should only be one factor weighted in all the circumstances in 1989. Counsel submits that the Board should look at the circumstances surrounding the discharge in 1985 citing *Comstock*, [1987] OLRB Rep. May 667. The applicant submits that had the matter been grieved in 1985 it may well have been reduced. The seriousness of the offence should have been a factor considered by Stone & Webster in its 1989 decision to refuse

to hire the grievors. The failure to grieve does not mean that there was just cause. It has been over four years since the discipline. At some point discipline becomes stale and should not be used to justify employer action four years later.

12. The misconduct here has clearly been repeated. The employer has continued to refuse to hire even after evidence of increased responsibility. Beith has been consistently rehired by other employers and promoted. There has been no subsequent suspension or discipline from other employers. There were no reasonable steps taken by the employer to investigate. The decision not to rehire the grievors was arbitrary, unreasonable and made in bad faith.

13. Respondent counsel submits that in this particular case, in the context of the collective agreement the *Ontario Hydro* test does not apply. The respondent does not have to satisfy the Board that the refusal to hire was reasonable or unreasonable, arbitrary or in good or bad faith. The fettering of Hydro's discretion came about as a result of the particular provision of the EPSCA agreement. The agreement in this case is much different. But even if the *Ontario Hydro* test is applied, clearly the decision here was a reasonable one.

14. There are some material differences between this agreement and EPSCA. There appears to be only one restriction on management's prerogative, the right to hire any employee referred to it. That obligation is found in Article 2(e) (because of age). The parties have turned their minds to discrimination in hiring and have only limited an otherwise unbridled right as it relates to age restrictions. All that Article 2 requires is that the person be a member of the union or have clearance from the union. It does not provide expressly or by implication that any company bound to its terms is obliged to hire any particular individual whether referred to or not. There are six different ways under this agreement that employees can be obtained. It does not, in the respondent's assessment, obligate them to hire any particular individual and should not be taken as fettering their right to hire any qualified individual. Counsel referred the Board to Article 24 of the collective agreement, Management Rights, which provides as follows:

The Union agrees and acknowledges that the Company has exclusive rights to manage the business, and to exercise such rights without restrictions, save and except as such prerogatives of management may be specifically modified by the terms and conditions of the Agreement.

Without restricting the generality of the foregoing paragraph, it is the exclusive function of the Company.

- To maintain order, discipline and efficiency and to:
- Hire, discharge, transfer, promote, demote, suspend or discipline Employees, provided that a claim that an Employee has been discharged or disciplined without reasonable cause may be the subject of a grievance, and dealt with as hereinafter provided.
- Generally manage the enterprises in which the Employer is engaged, and, without restricting the generality of the foregoing, to determine the locations of the work places, the materials, methods, machines and tools to be used in the execution of the work, and the working schedules, subject to the terms of this Agreement.

15. Considering the wording of the Union Security Clause together with the Management Rights Clause, counsel submits that *Ontario Hydro, supra*, does not apply. The respondent does



have a discretion in respect of the acceptance for hire. There are a number of differences between this case and *Ontario Hydro*. There was no management rights clause in *Ontario Hydro*. The agreement in this case is different. The respondent submits that there is no fettering of its discretion or none should be found and that this grievance should be dismissed.

16. In the alternative, if the Board requires this standard of review or test in this case, the test as articulated in *Ontario Hydro, supra*, is clearly satisfied here. This is the leading case on the subject and the Board took the time to examine the very issue before us. Where an employer has taken steps to discharge an employee for cause, the employer should not ever be obligated to rehire (para. 36 of *Ontario Hydro*.)

17. Counsel submits that the respondent has a right to discharge under the Management Rights provision and that when paragraph 36 of *Ontario Hydro, supra*, is reviewed, the case before us is the "easy" case. In the *Ontario Hydro* case, it was clearly stated that it has to be reasonable to refuse to rehire a person discharged in the past. The respondent certainly has a right to discharge under its provision in the Management Rights Clause. Counsel agrees with the Board's analysis in *Ontario Hydro* that it would be rendered effectively of no import if there was an obligation on the employer after the discharge to re-employ.

18. Counsel contends that we know the employees were discharged for a cause - intoxication and prior violations. If we want to consider whether it was just cause or reasonable, their agreement uses reasonable cause for management rights for discharge. The fact of the discharge and failure to grieve led to that conclusion. The applicant cannot say after the fact that there must be a judicial announcement that there was cause. The failure to grieve was not an acknowledgment that the discharge was for cause. It was left to the bargaining agent to handle and he said "Don't worry". The decision not to grieve was the bargaining agent's. There is an onus on the person who made the decision not to grieve to come forward and explain. Counsel suggested that they did not come forward because they agreed with the decision. The other reason for no grievance being filed was because the grievors found employment the next day. Counsel contends that the applicant now wants a finding that the discharges were not for just cause. Counsel submits that the applicant's position in effect is that it is now asking for a determination that the 1985 discharges were without just cause, four to five years after the fact.

19. Counsel contends that if the matter had been litigated in 1985 we would know a lot more about what happened in 1985. We heard the grievors' evidence that four or five beers had been consumed. The Board can make some qualified assessment as to how serious it was in 1985. But we do not know what happened in 1985. If they decided not to challenge it at the time it should be regarded as having been for just cause. Counsel contends that he does not know what could be more serious or detrimental to the interest of a construction company than tradesmen reporting for work at 4:30 in the afternoon after having consumed four or five beers. Cases in the industrial setting are not applicable in the construction industry. The Board has commented on the similarities of the construction and industrial setting. In support of its position counsel referred the Board to paragraph 11 of *Canadian Engineering and Contracting Co. Ltd.*, [1983] OLRB Rep. July 1017 which stated:

11. We accept, of course, that the employer-employee relationship in the construction industry is not a close one, and is not comparable with relationships that arise between employers and their employees in an industrial setting. Employment relationships are transitory and, as in the present case, workers will be referred from the hiring hall and employed for short periods of time without the kind of pre-selection which would be undertaken by an

industrial employer before engaging workers who could conceivably be employed on a long-term basis. Accordingly, we accept the need for a certain amount of realism and arbitral restraint in determining what constitutes just cause for discharge in a construction context. However, we are not persuaded that either the arbitral jurisprudence or the language of the collective agreement before us requires us to apply considerations that are *totally different* from those applied by arbitrators to employers who use the same language in collective agreements in other industries. In particular, the Board is of the view that the employer must at least warn a grievor that his job is in jeopardy prior to discharging him for "unsatisfactory performance" - which is what we found has happened in the circumstances of this case. In *Re Harold R. v. Stark Limited et al.* (1972) 1 L.A.C. (2d) 406 (Egan), the majority of the Board observed (at pages 406-407):

It was argued by the company that because of the special nature of the construction industry, different considerations ought to apply with respect to the discharge of employees to those obtaining in industry in general. In this regard, it is of some significance to note that the grievors are not in the position of long-term employees whose previously acceptable work performance has deteriorated. The grievors were assigned to the company by the union under the terms of the collective agreement. That is, of course, an arrangement quite common in the construction industry. In consequence of this practice, the grievors were taken on without any pre-hiring or qualifying interview such as might enable the company to make a pre-employment assessment. They entered into the employment of the company purporting to be competent tradesmen and were not subject to any probationary period of evaluation by the company. Therefore, there is no question of any knowledge, on the part of the company, as to the proficiency of the grievors at the time of their engagement as tradesmen qualified in the classifications which they hold.

We are not wholly persuaded, however, that totally different considerations from those applied to industry in general are applicable to discharge cases in the construction industry. In this connection, our attention was drawn to *Re United Ass'n of Journeymen & Apprentices of the Plumbing and Pipefitting Industry, Local 221, and Fraser-Brace Engineering Co. Ltd.* (1968), 19 L.A.C. 258 (Christie). This case involved the question of the discharge of an employee for "loafing" on a construction site. The company, in that case, argued that different considerations applied to discharge in the construction industry. The Board, in its decision in that case, stated that it was not unimpressed by the argument that rather different considerations may apply in the determination of what constitutes just cause for dismissal in the construction industry.

The grievor in the *Fraser-Brace* case, *supra*, appears to have been a chronic time waster, but received no admonitions from the company with respect to his conduct prior to his discharge. The Board went on to say, however, that "It is unnecessary to decide what differ-

ences it makes that we are dealing with the construction industry. Even if the requirements of 'cause' and just cause were considerably lower than they are in general industrial situations 'cause' for dismissal was not established here." The Board went on to find that the discharge was unjust because of the absence of a warning and reinstated the grievor.

See also *Proweld Company Limited*, [1982] OLRB Rep. March 437, and *White and Greer Company Limited*, Board File No. 1404-81-M, decision dated November 23, 1981, unreported, in which this Board confirmed that prior to the discharge of an employee in the construction industry for lack of production or inadequate quality, the employee is entitled at least to a warning that the employer is dissatisfied.

There is some similarity which has now been recognized and a warning may well be required, but the differences are distinct and outweigh the similarities. As the Board said in *Ontario Hydro*, *supra*, discharge of itself should give rise to a finding that a refusal to rehire in the future is a reasonable one. This should satisfy the *Ontario Hydro* test if we are subject to it.

20. Counsel for the respondent submits that with respect to the grievor's rehabilitation and work commitment, when assessing the reasonableness of the employer's position, the evidence of improvement was requested in May and this information was not brought forward until the first day of hearing. Counsel also submits that the Board has to assess the reasonableness of the respondent's decision at the time it was made. If the applicant is suggesting that there has been a change which would alter our obligation to hire they have an onus to present their evidence as part of their efforts to secure employment for these grievors. Sometime in August this evidence was brought forward affecting a decision made in May. The only evidence that should be considered is contemporary with the event or before. This decision should not be found to be unreasonable or arbitrary based on information which we now have but which the respondent did not have in May when it refused to rehire the grievors. Counsel further submits that the grievances should be dismissed.

#### Decision

21. Whether or not the 1985 discharge of the grievors was for cause, several years after the fact, is not a question before this Board. However, the fact that the respondent failed to advise the grievors, at the time of the discharge in 1985, that they were not eligible for rehire does affect this grievance. Beith had previously been discharged and rehired and had no reason to believe he would be barred from working for the respondent in the future. It is reasonable to assume that had either grievor been aware that they were not eligible for rehire they would have taken steps to protect their future employment opportunities with the respondent.

22. The collective agreement does not refer to re-hires. Article 2(a) states that "Local members who solicit their own jobs may be requested by the Company" and that "The company also agrees to hire unemployed members off the out-of-work lists of the Unions". This has to be read together with the management rights clause in Article 24, Management Rights, which provides that "it is the exclusive function of the company" to "hire", "discharge", "save and except as such prerogatives of management may be specifically modified by the terms and conditions of the Agreement". The exclusive hiring function is modified by the hiring hall provision of Article 2(a). If there is any selection to be made under Article 2(a) it is the members of the union who can solicit their own jobs. There is no name hire provision at the sole discretion of the employer in the collective agreement. The hiring hall concept in the construction industry is quite different from the process followed in other industries where candidates are selected through a screening process.



The hiring hall's obligation under the collective agreement is to provide competent tradesmen. In the circumstances of this case, we find the employer acted unreasonably in refusing to hire the grievors who were properly referred to the company under the collective agreement. The grievors were not advised at the time of the discharge that they were not eligible for rehire. There is no evidence that the applicant was made aware that the grievors were not eligible for rehire at the time of the discharge. There may be circumstances where notwithstanding the hiring hall provisions it may be reasonable to refuse to hire a tradesman referred, but this is not the case here.

23. Pursuant to the parties' agreement, the Board will remain seized with respect to any issue of damages, compensation or other remedial relief.

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**0697-90-FCA National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Venture Industries Canada, Ltd., Respondent**

**Adjournment - Collective Agreement - First Contract Arbitration - Interest Arbitration - Judicial Review - Practice and Procedure - Stay - Employer and termination applicant requesting that Board adjourn its hearings to arbitrate the settlement of a first collective agreement pending a stay and judicial review application in the courts - Adjournment denied - Board proceeding with hearings in absence of employer - Board amending significant number of articles in union's proposed collective agreement to reflect what should reasonably be contained in a first collective agreement - Board deleting paid education leave, COLA and pension plan provisions**

**BEFORE:** *Ken Petryshen*, Vice-Chair, and Board Members *R. M. Sloan* and *E. G. Theobald*.

**APPEARANCES:** *Daniel A. Harris*, *Leo Rustin* and *Joey Gander* for the applicant union; *Randy Burke* and *Frank A. Angeletti* for the applicant in Board File No. 2740-89-FC; no one appearing on behalf of the respondent company.

**DECISION OF THE BOARD;** July 23, 1990

1. This is an application filed pursuant to section 40a(4) of the *Labour Relations Act* arising out of the request of the parties that the Board arbitrate the settlement of the first collective agreement. The hearing was held on June 19 and 20, 1990.

2. On March 27, 1990, the Board (differently constituted) issued a decision directing arbitration of the first collective agreement with reasons to follow. When the panel issued the decision, it was unaware that a termination application had been filed with the Board by Randy Burke ("the Burke application"). After obtaining written representations from the parties, a hearing was scheduled to entertain the parties' submissions on how the Board should deal with the Burke application. In a decision dated May 31, 1990 the Board determined under section 40a(22) that it was appropriate in the circumstances to consider the first contract application before the Burke application. Pursuant to section 40a(22), the Board dismissed the Burke application.

3. Shortly after receiving the Board's decision of May 31, 1990, counsel for the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) ("CAW") requested that the arbitration be scheduled forthwith. By written notice dated June 12,

1990, the Registrar advised the parties of the hearing dates of June 19 and 20, 1990. Prior to June 19, 1990, counsel for Mr. Burke and counsel for Venture Industries Canada Ltd. ("Venture") requested that the Board adjourn the June hearing dates. The Registrar's office advised the CAW of these requests and the Board shortly thereafter was notified by the CAW that it opposed an adjournment. The position of the CAW was communicated by the Registrar's office to both the law firm representing Mr. Burke and the law firm representing Venture.

4. When the Board entered the hearing room on June 19, 1990 at approximately 9:30 a.m., no one had appeared for Venture and counsel for Mr. Burke was not present. Mr. Burke advised the panel that his counsel, Mr. Angeletti, would be a little late. In these circumstances, the Board followed its normal practice and set the matter down for 10:00 a.m. Before 10:00 a.m., Mr. Angeletti advised the Board by fax that he would not be able to appear until between 10:00 a.m. and 10:30 a.m. Mr. Angeletti appeared shortly after 10:00 a.m.

5. Mr. Angeletti's letter of June 15, 1990 requesting the adjournment reads as follows:

"As you are aware, the writer is solicitor for Randy Burke, the Applicant in a termination application in Board File Number 3167-89-R. As you are further aware, the Board has rendered a decision dated May 31, 1990 on that application and also referencing Board File Number 2740-89-FC. The Board, in that decision, dismissed Randy Burke's termination application.

This is to advise that I have now received instructions from Randy Burke, the Applicant, to seek Judicial Review of the Board decision dated May 31, 1990. However, I have also been advised that the Board has now scheduled hearings for Tuesday, June 19, 1990, and Wednesday, June 20, 1990, in Board File Number 0697-90-FCA for the purpose of hearing the evidence and representations of the parties with respect to their request that the Board arbitrate the settlement of the first Collective Agreement between the parties.

In view of that fact, I will also be bringing a stay application seeking an order to stay all procedures and hearings on these matters until the Judicial Review application has been heard.

I am attempting to obtain a date from Divisional Court in this matter with respect to the stay application, however, I will not be able to obtain a date prior to June 19, 1990. In that regard, this letter will constitute a formal request that the hearing scheduled for June 19 and June 20, 1990, be adjourned or stayed for a period of three (3) weeks in order to afford the writer the opportunity to perfect the application for Judicial Review and obtain a hearing date for the stay application. I would ask that this request be brought to the immediate attention of the Vice-Chair scheduled to deal with the hearings on June 19, 1990 and June 20, 1990.

I would appreciate your immediate response".

6. At the hearing on June 19, 1990, Mr. Angeletti reiterated his request that the proceedings be adjourned in order to permit Mr. Burke to have his stay application heard by the Court. Mr. Angeletti advised the panel that the date of June 21, 1990 had been obtained to at least deal with the stay application. He requested that the Board not proceed with the hearing to settle the first collective agreement until June 21 or until Mr. Burke's stay application could be heard by a Court. Although Mr. Angeletti's request was framed in this way, it was clear from his comments that Mr. Burke's concern, given that he was not a party to this proceeding, was not that the Board proceed with the hearing but that the Board would settle the first collective agreement before his stay application could be heard. The Board notes that it advised the parties at the hearing that even if the hearing was completed in the two scheduled days, the Board would not be in a position to issue a decision for practical reasons before June 22, 1990.

7. After entertaining Mr. Angeletti's brief representations and after recessing to consider the matter, the Board ruled orally at the hearing on June 19, 1990 that it would be inappropriate in

the circumstances to adjourn the proceeding. In the Board's view, labour relations considerations favoured proceeding with the hearing. The Board notes that one of the factors it considered was that any delay could have caused the Board considerable difficulty in meeting the forty-five day time period in section 40a(4)(b). As the Ontario Court of Appeal articulated in *Cedarvale Tree Services Ltd. v. Labourers' International Union of North America, Local 183*, (1971) CLLC 14,087, the Board, as master of its own procedure, is entitled to proceed with the hearing of a matter notwithstanding a pending or anticipated application for judicial review. On June 21, 1990, McKeown J. of the High Court denied Mr. Burke's request for a stay of Board proceedings.

8. After the Board ruled that it would not adjourn the proceeding while Mr. Burke attempts to obtain a stay from the Court, Mr. Angeletti advised the Board that Mr. Burke wished to address the Board and he then left the hearing room. Mr. Burke simply asked the Board to direct the taking of a representation vote. After considering Mr. Burke's request, the Board advised him at the hearing that his termination application was decided by another panel of the Board and that the present panel was unable to grant his request in the context of the application before us.

9. As the appearances disclose, no one appeared at the hearing on June 19, 1990 on behalf of Venture. Counsel for Venture sent the following communication by fax to the Registrar dated June 15, 1990:

"We are the solicitors for Venture Industries Canada Ltd. with respect to the above-noted matter. The Board hearings herein are scheduled for June 19 and 20 next.

We are writing to you to request that the above hearing dates be adjourned. Neither Mr. Michael Torakis nor Mr. Ted Lowe, our instructors herein, are available on either of the dates set by the Board. Further, our co-counsel, Mr. Stephen Cheifetz is away on business in Poland.

We have contacted Mr. Daniel Harris, solicitor for the C.A.W., by both telephone and by letter advising him of our request for an adjournment. A copy of our letter of even date to Mr. Harris is enclosed herewith. We will advise you forthwith upon receipt of Mr. Harris' reply to our request.

Yours very truly,

PATRICK F. MILLOY

At approximately 10:00 a.m. on June 19, 1990, the Board received the following communication by fax from Mr. Milloy.

This is to confirm that our request for an adjournment as set out in our letter dated June 15, 1990, has been denied and that as such, the hearing scheduled for June 19 and 20, 1990, will proceed.

We have been instructed by our client to advise you that our client remains unable to attend the hearing on the above dates and as such, we will not be in attendance at the Board hearings herein.

Our client reserves its right to seek judicial review of the Board's denial of its [sic] request for an adjournment herein.

10. The following excerpt from *Catalyst Technology (Canada) Ltd.*, [1987] OLRB Rep. June 803 at page 805 comments on the Board's practice when faced with adjournment requests:

The usual practice of the Board is to grant an adjournment only on the consent of all of the parties to a proceeding, or where a request for an adjournment is based on circumstances which are



beyond the control of the party making the request and where to proceed would seriously prejudice such party. See, for example, *Northwest Merchants Ltd. Canada*, [1983] OLRB Rep. July 1138, in which the Board wrote, in part, as follows (at paragraph 7):

...The Board has a discretion to adjourn any hearing, if it considers it advisable in the interests of justice, for such time and to such place and upon such terms as it considers fit (see section 82(1) of the Board's Rules of Procedure; see also section 21 of the Statutory Powers Procedures Act, R.S.O. 1980, c. 484). In exercising this discretion, the Board has adopted a policy which recognizes the great importance of expedition to the efficacious administration of the *Labour Relations Act*. In *Labour Relations Bureau of Ontario General Contractors Association*, [1979] OLRB Rep. 1036, at paragraph 8, the Board stated:

"...The usual practice of the Board is to grant adjournments only on the consent of all of the parties to a proceeding. With respect to situations where one party is not prepared to agree to an adjournment, in the *Baycrest Centre of Geriatric Care* case, [1976] OLRB Rep. 432, the Board stated at page 433:

5. The Board policy with respect to adjournments has been capsulized in the *Nick Masney* case [1968] OLRB Rep. 823 (upheld in the Ontario Court of Appeal ¶70 CLLC 14,024) wherein the Board stated: '... the Board's decision to deny the respondent's request for an adjournment was based on the Board's practice to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party i.e., where it is proven that a witness essential to the party's case is unable to attend because of serious illness...'"

The powers of the Board with respect to adjournments were confirmed by the Ontario Divisional Court in *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879* (1979), 24 O.R. (2d) 400, at pages 404 and 405:

"Clearly, an administrative tribunal such as the Labour Relations Board is entitled to determine its own practices and procedures. Whether in a given case an adjournment should or should not be granted is a matter to be determined by the Board charged as it is with the responsibility of administering a comprehensive statute regulating labour relations. In the administration of that statute the Board is required to make many determinations of both fact and of law and to exercise its discretion in a variety of situations. In the case of a request for adjournment, it is manifestly in the best position to decide whether, having regard to the nature of the substantive application before it, the adjournment should be granted or whether the interests of the employer, the employees or the union who, as the case may be, oppose the adjournment should prevail over the party seeking it. As a matter of jurisdiction, it is for the Board to decide whether it should adjourn proceedings before it and in what circumstances.

This is not to say that there cannot be situations in which a refusal to grant an adjournment might amount to a denial of natural justice. There are circumstances in which that might be so: see, for example, *R. v. Ontario Labour Relations Board, Ex p. Nick Masney Hotels Ltd.* [1970] 3 O.R. 461, 13 D.L.R. (3d) 289 (C.A.); *Re Gill Lumber Chipman (1973) Ltd. and United Brotherhood of Carpenters & Joiners of America, Local Union 2142* (1973), 42 D.L.R. (3d) 271, 7 N.B.R. (2d) 41. It is necessary to examine the facts of each case to determine if the tribunal acted, as it must, in a fair and reasonable way. It must, of course, comply with the provisions of the *Statutory Powers Procedure Act* 1971 (Ont.) c.47, and afford the parties the opportunity to be present and be represented if they wish by counsel. But a

party who has adequate notice of the hearing does not have a right to an adjournment and is not entitled to insist on one for his convenience or the convenience of his representative. It is for the Board to determine whether to adjourn on the basis of the obvious desirability of speedy and expeditious proceedings in labour relations matters, the background of the particular case, the issues involved, the reason for the request and other like factors.

• • •

It cannot be suggested that the Board may not in the exercise of its discretion adopt a general policy respecting adjournments of its proceedings: see *The King v. Port of London Authority, Ex. p. Kynock, Ltd.*, [1919] 1 K.B. 176. That policy is obviously necessary to the proper administration of the Board's process..."

11. As noted earlier, the CAW opposed the adjournment request made by Venture. When no agreement to adjourn has been reached prior to a hearing, it is necessary for a party who wants an adjournment to appear and make its submissions. Given the failure of these parties to agree to adjourn the hearing, the Board anticipated it would have to deal with an adjournment request from Venture on June 19, 1990. A panel of the Board had not denied Venture's request for an adjournment prior to June 19, 1990. However, Venture elected not to appear on June 19, 1990 to place before the Board the basis upon which it felt an adjournment was warranted. With no appearance on behalf of Venture and with the CAW opposing any adjournment, the Board proceeded to hear the application.

12. In correspondence to the Board dated April 3, 1990, Mr. Milloy confirmed the agreement between Venture and the CAW to have the Labour Relations Board act as the Board of Arbitration to settle the first collective agreement. In correspondence dated April 18, 1990 which deals with a number of matters, Venture purports to withdraw this agreement. It does not appear that any further reference is made to the purported withdrawal of the agreement in subsequent correspondence to the Board from Mr. Milloy. Given that no one appeared for Venture at the hearing on June 19, 1990, the Board does not know whether Venture intended to pursue its withdrawal of the agreement with the CAW or the basis upon which it would maintain that it could withdraw from such an agreement. The panel raised the matter of the purported withdrawal with counsel for the CAW at the hearing. Counsel for the CAW was unable to provide the Board with any new information and strenuously argued that the Board should proceed. Given the failure of anyone to appear on behalf of Venture to make submissions as to why it ought to be permitted to withdraw from its agreement that this Board settle the first collective agreement, the Board determined that it had jurisdiction to settle the first collective agreement between Venture and the CAW.

13. In settling the first collective agreement in this instance, the Board has before it the materials filed by the CAW and the evidence of two witnesses called by the CAW. Venture did not file materials as required by Practice Note #19. The material filed by the CAW included a collective agreement which it was prepared to execute and it was the position of the CAW that the Board should settle the collective agreement based upon the terms contained in its proposed collective agreement. At the hearing, the panel questioned the CAW witnesses and counsel in order to appreciate the terms of the proposed collective agreement, the present terms of employment of Venture employees and the nature of the material filed by the CAW.

14. As a general guideline, the Board has adopted the approach utilized by the British Columbia Labour Relations Board in *London Drugs Ltd.*, [1974] 1 Canadian LRB 140. At page 147 of that decision, P. C. Weiler, who was Chairman at that time, commented on the components

to be included in a first collective agreement under British Columbia's first contract legislation as follows:

"As regards the language and structure of the collective agreement, the Board does not believe that s. 70 should be used to achieve major breakthroughs in collective bargaining. Instead, we will try to settle on terms which reflect a fairly general consensus of what should be in a collective agreement, as tailored to the requirements of the operation before us. We will leave it to future negotiations between these parties to develop any innovations in that language. However, ...[w]e intend to see that the collective agreements we settle under s.70 are sufficiently attractive to the employees affected by them that they will think twice before applying to rid themselves of their union representatives and thus forfeiting the agreement..."

This approach was followed by the Board in *Burlington Northern Air Freight (Canada) Ltd.*, [1986] OLRB Rep. Oct. 1327 and *Egan Visual Inc.*, [1986] OLRB Rep. Dec. 1687.

15. Having carefully considered all of the material before us, we have concluded that the attached document marked "Appendix" shall be the first collective agreement between the applicant and the respondent. In accordance with section 40a(17) of the Act, the Board has accepted all of the matters agreed to by the parties in writing, including Articles 2, 3, 4, 5, 6, 10, 11, 22, 23, 24.03, 25, 29, 31, 32, 34 and 36 and Letters of Understanding Nos. 2, 4, 6, 9 and 10. Of the remaining articles set out in the CAW's proposed collective agreement, the Board amended a significant number of them in order to reflect what in our view should reasonably be contained in a first collective agreement. Our sense of what should be contained in this first collective agreement is based on the current collective bargaining climate, the provisions of those collective agreements placed before us by the CAW (all of which were renewal agreements) and the evidence of Mr. Rustin, the CAW representative. In a number of instances, Mr. Rustin candidly acknowledged that it would be uncommon for some of the provisions in the CAW's proposed collective agreement to be included in a first collective agreement. In addition, a number of the terms in the proposed collective agreement were absent or quite different from those in the renewal agreements before us. Since a comparison with the CAW's proposed collective agreement and the Appendix can be easily made, the Board will not set out in any detail the alterations it has made. We note, however, that we have deleted the paid education leave, COLA and the pension plan provisions. Such provisions would not usually be found in a first collective agreement. We have also reduced the wages as contained in the proposed collective agreement. The employees did receive a significant wage increase in June 1989 and the increases we have determined to be appropriate are more reflective of the current bargaining climate.

16. We have attempted to provide the parties with a workable first collective agreement. If any of the terms we have arbitrated prove to be unsatisfactory, it is open to the parties to revise them by mutual consent at any time.

[Collective agreement appendix deleted: Editor]

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**0694-89-R The Ontario Secondary School Teachers' Federation, Applicant v. The Board of Education for the City of Windsor, Respondent**

**Bargaining Unit - Certification - School Boards and Teachers Collective Negotiations Act**  
 - Union seeking to represent a group of instructors teaching particular courses while employer arguing appropriate unit should encompass all continuing education instructors, regardless of courses taught -Employer's description appropriate - Board also not departing from its usual "30/30" rule in determining who is an employee - Board not finding it appropriate to sub-divide the instructor group on the basis of number of courses taught or number of teaching hours

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

**APPEARANCES:** *Maurice A Green*, *Mike Walsh*, *Malcolm Buchanan* and *Jean Wallis* for the applicant; *Raymond Colautti*, *V. Bill Piliotis* and *James K. Fleming* for the respondent.

**DECISION OF THE BOARD;** July 13, 1990

1. This is an application for certification. There is no dispute that the application is timely or that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. What divides the parties is the description and composition of the unit of employees appropriate for collective bargaining. The employer proposes that the unit should consist of:

*all continuing education* instructors employed by the Respondent in Windsor, save and except administrator of continuing education, persons above the rank of administrator of continuing education and persons in bargaining units for which any trade union held bargaining rights as of June 13, 1989.

The union proposes a narrower bargaining unit framed as follows:

all continuing education instructors employed by the Respondent in the City of Windsor, *in Adult Basic Education and Adult English as a second language courses*, ["ESL"/"ABE"] save and except administrator of continuing education, persons above the rank of administrator of continuing education, and persons in bargaining units for which any trade union held bargaining rights as of June 13, 1989.

In effect, the union is seeking to represent a group of instructors teaching particular courses, while the employer maintains that the appropriate unit should encompass all continuing education instructors, regardless of the courses that they teach. The employer submits that to grant the union's proposed unit would further sub-divide an already fragmented and cumbersome bargaining structure which currently includes: two occasional teachers bargaining units, a professional employees unit, an office and clerical unit, a teaching assistance unit, a custodians and maintenance workers unit, five skilled trades units, and two bargaining units (involving three trade unions) established pursuant to the *School Boards and Teachers Collective Negotiation Act (1975)* ("Bill 100"). The union replies that the bargaining structure is already fragmented, and that in any event, the employees it seeks to represent have a sufficiently coherent community of interest to warrant grouping them together in their own bargaining unit - separate and distinct from any unit(s) which might subsequently be created for other continuing education instructors.

2. For the purpose of clarity, we should note at this point that, however the bargaining

unit is defined, all of the employees fall within the scope of the *Ontario Labour Relations Act*. None of them are “teachers” covered by Bill 100. We might also note that none of these continuing education instructors requires an Ontario teaching certificate (OTC) in order to conduct their course - although the majority of instructors in the union’s proposed unit do have an OTC. Finally, we should note that, in addition to the dispute concerning the *description* of the bargaining unit, there were issues concerning the employee list, namely: how to treat instructors who are not actually at work on the application date, and whether the employer should be permitted to rectify and add names to the list originally filed in this matter.

3. In accordance with its usual practice when the bargaining unit description or composition is in dispute, the Board appointed a Labour Relations Officer to meet with the parties to inquire into the community of interest of the employees potentially affected by this application. As it turned out, the parties were able to reach an agreed statement of facts which was subsequently put before the Board. The Board then scheduled a hearing to give the parties the opportunity to make representations on the various matters in dispute.

4. We have considered the agreed facts and the parties’ representations. We have also considered the various cases to which we were referred, in argument, and in particular: *Board of Education for the City of Toronto*, [1986] OLRB Rep. June 900. In that case the Board reviewed its approach to bargaining unit determination at some length, and ultimately *rejected* the union’s request for a bargaining unit of instructors teaching English as a second language in the School Board’s Adult and continuing Education program. In other words, in similar circumstances, the Board rejected a unit framed in a manner similar to the one the union urges upon us.

5. For the purpose of this case we adopt the reasoning of the Board in *Board of Education for the City of Toronto*, and reach the same conclusion, namely: that the unit of ABE and ESL instructors proposed by the applicant union is not *appropriate* for collective bargaining. Rather, the appropriate bargaining unit is that proposed by the respondent and set out above. We do not think this case is distinguishable, nor do we think the amendments to the *Education Act* to which the union referred affect our jurisdiction or discretion to fashion a bargaining unit which, in our view, makes “industrial relations sense”. We will give more detailed reasons for this conclusion if either party so requests in writing.

6. On the subsidiary issues, for reasons to be given in writing, if requested, the Board finds that there is no reason to depart from its usual “30/30 day rule of thumb” in determining who is an “employee” for the purpose of section 7 of the Act. Accordingly, in the case of instructors not actually at work on the date of the application, the employee list should include all those who worked in the 30 days immediately preceding the application date and in the 30 days immediately following the application date.

7. The Board is satisfied that the employer should be able to rectify its list so as to properly identify those individuals actually in the bargaining unit, even though this involves adding some names to the list initially filed in this matter. The request to amend the list was made prior to the release of the union’s membership count, there is no question of “gerrymandering”, and given the nature of the work force, it is entirely understandable that it might be difficult for the employer to compile an accurate list within the response time specified by the Board’s Rules. Finally, having considered the nature of the instructors’ work, their terms and conditions of employment, and the fact that they all teach non-credit courses for which no OTC is actually required, we have not considered it appropriate to sub-divide the instructor group on the basis of the number of courses taught or number of teaching hours. The appropriate unit, therefore, is that described in paragraph 1 above.

8. Having regard to the foregoing, the Board hereby reappoints a Labour Relations Officer to meet with the parties to assist them to settle the employee list on the basis of the findings and determinations set out above. Should it become necessary to do so, the matter will be relisted for hearing to consider any further issues which might arise.











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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1990

### APPLICATIONS FOR CERTIFICATION

#### Bargaining Agents Certified Without Vote

**0111-89-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Beling Cement Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (46 employees in unit)

**0730-89-R:** International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. S & T Electrical Contractors Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

**2336-89-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Johnson Controls Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Tillsonburg, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period or on a co-operative training basis with a school, college or university, and security guards" (427 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0915-89-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. David Chapman's Icecream Ltd. (Respondent)

Unit #1: "all employees of David Chapman's Icecream in the Town of Markdale, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (45 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of David Chapman's Icecream in the Town of Markdale, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (14 employees in unit) (*Having regard to the agreement of the parties*)

**0094-90-R:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Lor-J Construction, Division of 859875 Ontario Inc. (Respondent)



Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

**0131-90-R:** Canadian Union of Public Employees (Applicant) v. Laidlaw Waste Systems Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Nepean, save and except supervisors and persons above the rank of supervisor, dispatchers, office and sales staff, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of April 11, 1990” (22 employees in unit) (*Having regard to the agreement of the parties*)

**0201-90-R:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. C.M. Carpentry (Respondent) v. Group of Employees (Objectors)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

**0276-90-R:** Association of Allied Health Professionals: Ontario (Applicant) v. Bruce Grey Owen Sound Health Unit (Respondent) v. Service Employees’ Union, Local 210 Affiliated with OFL, CLC, AFL - CIO (Intervener)

Unit: “all paramedical employees of the respondent, save and except supervisors, persons above the rank of supervisor, and persons employed in any bargaining units for which any trade union held bargaining rights as at April 27, 1990” (11 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0281-90-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. General Seating of Canada Ltd. (Respondent)

Unit: “all employees of the respondent at Woodstock, save and except forepersons, persons above the rank of foreperson, office and sales staff” (87 employees in unit) (*Having regard to the agreements of the parties*)

**0322-90-R:** Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Bob Hendricksen Construction Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (10 employees in unit)

**0351-90-R:** Canadian Union of Public Employees (Applicant) v. Rodman Hall Arts Centre & National Exhibition Centre (Respondent)

Unit #1: “all employees of the respondent in St. Catharines, save and except the Director, persons above the rank of Director and persons regularly employed for not more than 24 hours per week” (3 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in St. Catharines regularly employed for not more than 24 hours

per week, save and except the Director, persons above the rank of Director” (5 employees in unit) (*Having regard to the agreement of the parties*)

**0378-90-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Vissers Nursery (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

**0380-90-R:** Ontario Nurses’ Association (Applicant) v. Caressant Care Nursing Home, Woodstock (Respondent)

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent at Woodstock, save and except the Assistant Director of Nurses, persons above the rank of Assistant Director of nurses and registered and graduate nurses regularly employed for not more than 24 hours per week” (4 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all registered and graduate nurses employed in a nursing capacity by the respondent at Woodstock regularly employed for not more than 24 hours per week, save and except the Assistant Director of nurses and persons above the rank of Assistant Director of nurses” (5 employees in unit) (*Having regard to the agreement of the parties*)

**0381-90-R:** International Union of Operating Engineers, Local 793 (Applicant) v. John Munharvey’s Rentals Ltd. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all sectors of the construction industry in the the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

**0384-90-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Pebra Inc. (Respondent)

Unit: “all office and clerical employees of the respondent in Peterborough, save and except supervisors, persons above the rank of supervisor, professional engineers, the Human Resources Coordinator, and secretary to the General Manager” (10 employees in unit) (*Having regard to the agreement of the parties*)

**0392-90-R:** London & District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Country Terrace (Respondent)

Unit: “all registered nurses of the respondent in Komoka, save and except Head Nurse, persons above the rank of Head Nurse, and office and clerical staff” (9 employees in unit)

**0406-90-R:** Ontario Nurses’ Association (Applicant) v. The Corporation of the County of Lanark (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent at Lanark Lodge in the County of Lanark, save and except Assistant Director of Nursing and persons above the rank of Assistant Director of Nursing” (12 employees in unit) (*Having regard to the agreement of the parties*)

**0414-90-R:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Premdor Inc. (Respondent)

Unit: “all employees of the respondent in the Town of Vaughan, save and except forepersons, persons above the rank of foreperson, office and sales staff, security personnel, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (60 employees in unit) (*Having regard to the agreement of the parties*)

**0421-90-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Seaway Employees’ (St. Catharines) Credit Union Ltd. (Respondent)

Unit: “all employees of the respondent in Thorold, save and except the Treasurer-Manager” (3 employees in unit) (*Having regard to the agreement of the parties*)

**0439-90-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Belor Construction Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (12 employees in unit)

**0503-90-R:** Teamsters, Local No. 419 (Applicant) v. Grenville Management & Printing Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Oshawa, save and except supervisors, persons above the rank of supervisor, and students employed during the school vacation period” (31 employees in unit) (*Having regard to the agreement of the parties*)

**0513-90-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Conpour Services Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (8 employees in unit)

**0517-90-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Weston Mechanical Inc. (Respondent)

Unit: “all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**3272-89-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Manitouwadge (Respondent) v. The Canadian Union of Township Employees (C.N.T.U.) (Intervener)

Unit: “all employees of the respondent, save and except Officers of the Corporation, Department Heads,



Foremen, Working Foremen, office, clerical, Library staff and By-Law Enforcement Officer" (16 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots marked in favour of applicant	15
Number of ballots marked in favour of intervener	0

**3285-89-R:** United Steelworkers of America (Applicant) v. V.I.P. Hotels Ltd. c.o.b. Sutton Place Hotel, Kempinski (Respondent) v. Hotel Employees Restaurant Employees Union, Local 75 (Intervener)

Unit: "all employees of the respondent at its Sutton Place Hotel, Kempinski in the City of Toronto, save and except supervisors, those persons above the rank of supervisor, office, clerical and sales staff, health club attendant, front desk receptionist and night auditor" (308 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	310
Number of persons who cast ballots	182
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	180
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked against applicant	173
Number of ballots marked in favour of intervener	7

**0049-90-R:** Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 91 (Applicant) v. Brushcraft Division, Dustbane Products Ltd. (Respondent) v. Inter-Provincial Brotherhood of Electrical Workers, (CLC) Fraternité Interprovinciale Des Ouvriers En Electricité (CLC) (Intervener)

Unit: "all employees of Brushcraft Division of Dustbane Products Limited in the Regional Municipality of Ottawa-Carleton, Ontario, save and except forepersons, persons above the rank of forepersons, office, clerical and sales staff, truck drivers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, and persons in any bargaining unit for which any trade union held bargaining rights as of April 4, 1990" (16 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	16
Number of spoiled ballots	5
Number of ballots marked in favour of applicant	11
Number of ballots marked in favour of intervener	0

**0272-90-R:** Canadian Paperworkers Union (Applicant) v. Quebec & Ontario Paper Company Ltd. (Respondent) v. International Union of Operating Engineers, Local 232 (Intervener)

Unit: "all employees of the respondent in Thorold, save and except assistant supervisors, persons above the rank of assistant supervisor, office and technical staff, security guards and watchmen, control department employees excepting testers on hourly rated jobs, and employees in bargaining units for which any trade union other than the incumbent International Union of Operating Engineers, Local 232, held bargaining rights as of May 11, 1990" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	3

### **Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**2318-89-R:** Scarborough Association of Student Services Professionals (Applicant) v. The Board of Education

for the City of Scarborough (Respondent) v. Association of Professional Student Service Personnel (Intervener)

Unit: "all psychologists, assistants in psychology, and social workers employed by the respondent, save and except chief psychologists, and chief social workers, persons above the rank of chief psychologists and chief social workers, attendance counsellors, psychometrists and persons regularly employed for not more than 24 hours per week" (50 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	50
Number of persons who cast ballots	45
Number of ballots marked in favour of applicant	44
Number of ballots marked in favour of intervener	1

**2925-89-R:** Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Hamilton Entertainment & Convention Facilities Inc. (Respondent) v. International Union of Operating Engineers, Local 772 (Intervener #1) v. International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, Local 129 (Intervener #2) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Hamilton Convention Centre, 115 King Street West, Hamilton, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant supervisors, persons above the rank of assistant supervisor, office, clerical and sales staff, and employees in bargaining units for which any trade union held bargaining rights as of February 26, 1990" (206 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	203
Number of persons who cast ballots	91
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	90
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	53
Number of ballots marked against applicant	36

### Applications for Certification Dismissed Without Vote

**0068-88-R:** Canadian Guards Association (Applicant) v. Pinkerton's of Canada Ltd., (Respondent) v. Richard Bibeault, Intervener #1 v. Inco Limited (Intervener #2) v. Attorney-General of Ontario (Intervener #3)

**0767-88-R** Canadian Guards Association (Applicant) v. Pinkerton's of Canada Ltd. (Respondent) v. Inco Limited (Intervener #1) v. Attorney-General of Ontario (Intervener #2)

**1149-88-R** Canadian Guards Association (Applicant) v. National Protective Services Company Limited (Respondent) v. George Faulkenburg (Intervener #1) v. Inco Limited (Intervener #2) v. Attorney-General of Ontario (Intervener #3)

**1484-88-R** Canadian Guards Association (Applicant) v. Board of Management for the Metropolitan Toronto Zoo (Respondent) v. International Union United Plant Guards Local 1962 (Intervener #1) v. Ron Saxton (Intervener #2) v. Inco Limited (Intervener #3) v. Attorney-General of Ontario (Intervener #4)

**1552-88-R** Canadian Guards Association (Applicant) v. Burns International Security Services Limited (Respondent) v. Gordon A. Southorn (Intervener #1) v. Inco Limited (Intervener #2) v. Attorney-General of Ontario (Intervener #3)

**2261-88-R** Canadian Guards Association (Applicant) v. Wackenhut of Canada Limited (Respondent) v. Shane Freeman (Intervener #1) v. Inco Limited (Intervener #2) v. Attorney-General of Ontario (Intervener #3)

**2666-88-R** United Steelworkers of America (Applicant) v. Pinkerton's of Canada Ltd. (Respondent) v. Larry Bishop (Intervener #1) v. Inco Limited (Intervener #2) v. Attorney-General of Ontario, (Intervener #3)

**0720-89-R:** Laundry & Linen Drivers & Industrial Workers union, Local 847, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. 732571 Ontario Ltd. and 732570 Ontario Inc. c.o.b. in partnership as Roytec Vinyl Co. (Respondents) v. Group of Employees (Objectors) (92 employees in unit)

**2559-89-R:** IWA - Canada (Applicant) v. Custom Windows Ltd. c.o.b. as Master Seal Windows (Respondent) v. Group of Employees (Objectors) (59 employees in unit)

**3296-89-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Western Inventory Services Ltd. (Respondent) (156 employees in unit)

### **Applications for Certification Dismissed Subsequent to a Post-Hearing Vote**

**1781-89-R:** Teamsters, Chauffeurs, Warehousemen & Helpers, Local 91 (Applicant) v. Trans Continental Printing Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Cornwall, save and except foremen, those above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (110 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	121
Number of persons who cast ballots	106
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	85

**2841-89-R; 2842-89-R:** Graphic Communications International Union, Local 500M (Applicant) v. Corweb Litho Inc. and Corrado Graphics Ltd. (Respondents) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Brampton, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	17
Number of persons who cast ballots	15
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	14
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	12

### **Application for Certification Withdrawn**

**0918-89-R:** International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. A City Window Repair Company Ltd. (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 837 (Intervener) v. Group of Employees (Objectors)

**1828-89-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Allan G. Cook Ltd. (Respondent) v. Group of Employees (Objectors)

**2793-89-R:** International Union of United Plant Guards Workers of America, Local 1962 (Applicant) v. The Sisters of St. Joseph of the Diocese of Toronto in Upper Canada (Respondent)

**0213-90-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the



United States & Canada, Local 71 (Applicant) v. 820783 Ontario Ltd. o/a Kool-Temp Mechanical (Respondent) v. Group of Employees (Objectors)

**0216-90-R:** Canadian Union of Public Employees (Applicant) v. Corporation of the Township of Sandwich South (Respondent)

**0372-90-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Garland Commercial Ranges Ltd. (Respondent)

**0550-90-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Skyjack Inc. (Respondent) v. Group of Employees (Objectors)

## APPLICATIONS FOR FIRST CONTRACT ARBITRATION

**2740-89-FC:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Venture Industries Canada, Ltd. (Respondent) (*Dismissed*)

**3180-89-FC:** Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 397 (Respondent) (*Granted*)

**3269-89-FC:** United Steelworkers of America (Applicant) v. Valco Furniture Ltd. (Respondent) (*Dismissed*)

**0358-90-FC:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. New-Vision Renovations (Respondent) (*Granted*)

**0698-90-FCA:** Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 397 (Respondent) (*Withdrawn*)

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**0228-89-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 461 (Applicant) v. The Hostess Frito-Lay Company (Respondent) v. United Food & Commercial Workers International Union, Local 175 (Intervener) (*Withdrawn*)

**0229-89-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 461 (Applicant) v. 158291 Canads Inc. (Respondent) v. United Food & Commercial Workers International Union, Local 175 (Intervener) (*Withdrawn*)

**3049-89-R:** Labourers' International Union of North America, Local 183 (Applicant) v. M. Kimel Realty, Westdale Properties, A Limited Partnership and Westdale Construction Co. Ltd. (Respondents) v. Group of Employees (Objectors) (*Granted*)

**3150-89-R:** Formwork Council of Ontario Labourers' International Union of North America, Local 183 (Applicant) v. Silric Construction Ltd., 731358 Ontario Ltd. c.o.b. as Marzin Construction, Tru-North Concrete Forming Ltd., Horonia Highrise Ltd. (Respondents) (*Granted*)

**3282-89-R:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Lekttek Systems Inc. and Norelder Automation & Control Inc. (Respondents) (*Granted*)

## SALE OF A BUSINESS

**0228-89-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 461 (Applicant) v. The Hostess Frito-Lay Company (Respondent) v. United Food & Commercial Workers International Union, Local 175 (Intervener) (*Withdrawn*)

**0229-89-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 461 (Applicant) v. 158291 Canads Inc. (Respondent) v. United Food & Commercial Workers International Union, Local 175 (Intervener) (*Withdrawn*)

**2161-89-R:** Bruce-Grey-Owen Sound Health Unit (Applicant) v. Service Employees Union, Local 210 affiliated with Service Employees International Union, AFL-CIO-CLC (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

**3150-89-R:** Formwork Council of Ontario Labourers' International Union of North America, Local 183 (Applicant) v. Silric Construction Ltd., 731358 Ontario Ltd. c.o.b. as Marzin Construction, Tru-North Concrete Forming Ltd., Horonia Highrise Ltd. (Respondents) (*Granted*)

**3282-89-R:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Lekttek Systems Inc. and Norelder Automation & Control Inc. (Respondents) (*Granted*)

## CROWN TRANSFER ACT

**0953-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Natural Resources, and John Knight and Lorraine Norris c.o.b. as Agassiz Forestry Environmental Services (Respondents) (*Granted*)

**1887-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Natural Resources, and The Board of Governors of Algonquin College of Applied Arts & Technology (Respondents) (*Dismissed*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1830-89-R:** Brenda Dewey (Applicant) v. Local 75 (Respondent) (*Dismissed*)

**2232-89-R:** Laura Maki (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Current River Foods Ltd. (Intervener)

Unit: "all employees of the employer at Current River in the City of Thunder Bay, save and except meat market department manager and persons above the rank of meat department manager" (20 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	20
Number of persons who cast ballots	19
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	18
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	18
Ballots segregated and not counted	1

**3051-89-R:** Gerard Harte (Applicant) v. United Steelworkers of America, Local 8900 (Respondent) v. Burnstein Castings Ltd. (Intervener)

Unit: "all employees of Burnstein Castings Ltd., in St. Catharines, save and except foremen, persons above the rank of foreman, office, sales and technical staff and students employed during the school vacation period" (73 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	68
Persons added to list on agreement of parties	5
Persons added to list on request of the respondent	1
Persons challenged by applicant	1

Number of names of persons on revised voters' list	74
Number of persons who cast ballots	69
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	67
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of respondent	25
Number of ballots marked against respondent	42
Ballots segregated and not counted	2

**3088-89-R:** Edna Hodges (Applicant) v. International Ladies Garment Workers Union (Respondent) v. G.H. Group of Companies Antoinette Fashions Ltd. (Intervener) (84 employees in unit) (*Dismissed*)

**3155-89-R:** Ute Bosje and John W. Walker (Applicant) v. Canadian Union of Public Employees and its Local 1994 (Respondent)

Unit: "all employees of the Corporation of the Towns of Oakville employed in its Transit Department, save and except forepersons, inspectors, dispatcher training safety officer, persons above the rank of those ranks and office staff" (101 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	101
Persons added to list on request of parties	1
Number of names of persons on revised voters' list	102
Number of persons who cast ballots	83
Number of ballots marked in favour of respondent	20
Number of ballots marked against respondent	63

**3167-89-R:** Randy Burke (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) (38 employees in unit) (*Dismissed*)

**3168-89-R:** Raymond Thibault (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. F.H.R. Construction Ltd. (Intervener)

Unit: "all employees of F.H.R. Construction Ltd. engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in repairing or maintaining of same and all employees of F.H.R. Construction Ltd. engaged as surveyors within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	3
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

**3216-89-R:** Brad. S. Watling, Brian Nicholson, James S. Metcalfe, J. Edward Harper (Applicants) v. Labourers' International Union of North America, Local 183 (Respondent) (6 employees in unit) (*Dismissed*)

**3217-89-R:** Michel Hilliard (Applicant) v. Sheet Metal Workers' International Association, Local 47 (Respondent) v. Quality Roofing (Ottawa) Ltd. (Intervener) (1 employee in unit) (*Dismissed*)

**3276-89-R:** Ronald Gary Emmons (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:-CLC: (Respondent) v. Hully Gully (London) Ltd. (Intervener) (11 employees in unit) (*Dismissed*)

**3306-89-R:** Mark Gillespie (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. B. Maskell Ltd. (Intervener) (*Withdrawn*)



**0057-90-R:** Employees of Ebel Quarries Ltd. (Applicant) v. United Steelworkers of America (Respondent) (9 employees in unit) (*Granted*)

**0194-90-R:** Chris O'Reilly and the Members of U.S.W.A., Local 7337 (Recently changed to become part of U.S.W.A., Local 8982) (Applicant) v. United Steelworkers of America (Respondent) v. Construction Products Inc., Canadian Division (Intervener) (37 employees in unit) (*Granted*)

## **APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE**

**0837-90-U:** Monarch Fine Foods a division of Thomas J. Lipton Inc. (Applicant) v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Local No. 647, Alex McConkey, Eston Sitahall, Terry Govereau, Bruno Pelliccotta, Jack Parry, Donna Waslyk, Larry McConkey and Rick Amor (Respondents) (*Granted*)

## **APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)**

**0437-90-U:** Powertel Utilities Contractors Ltd. (Applicant) v. International Brotherhood of Electrical Workers, Local 1687, Larry Lineham, Henry Darling (Respondents) (*Dismissed*)

**0575-90-U:** Mechanical Contractors Association Ontario (Applicant) v. Lincoln Mechanical Contractors, William McKay and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 666 (Respondents) (*Withdrawn*)

**0599-90-U:** Ellis-Don Construction Ltd. (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 67, International Brotherhood of Electrical Workers, Local 105, F. Wilson and J. Beattie (Respondents) (*Withdrawn*)

**0653-90-U:** Horton CBI, Ltd. (Applicant) v. Leo E. Evans, Joe L. Da Silva, Terrance R. McGuire, and Sanford Jones (Respondents) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Intervener) (*Granted*)

## **APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT**

**0720-90-U; 0721-90-U:** Glass, Molders, Pottery, Plastics & Allied Workers International Union, through its Local 64 (Applicant) v. Aluminum Reduction Company (Respondent) (*Dismissed*)

## **COMPLAINTS OF UNFAIR LABOUR PRACTICE**

**2568-87-U; 2460-88-U:** Balford Lindsay (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 1451 (Respondent) v. Budd Canada Inc. (Intervener) (*Dismissed*)

**1650-88-U; 1733-88-U:** Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Air Cab Limousine Services (1985) Ltd., Mr. Y. Zahavy, Aaroport Limousine Services Ltd. and McIntosh Limousine Services Ltd. (Respondents) (*Withdrawn*)

**2642-88-U:** Teamsters Local No. 938 (Complainant) v. Air Cab Limousine Services (1985) Ltd., Aaroport Limousine Services Ltd., McIntosh Limousine Services Ltd., Mr. Y. Zahavy, Transport Canada, Chern S. Heed and T.I.A. Limousine Operators Association (Respondents) (*Withdrawn*)

**2871-88-U:** Allan H. R. Marshall (Complainant) v. Canadian Union of Public Employees, Local 839 (Respondent) v. Chedoke-McMaster Hospitals (Intervener) (*Dismissed*)

**0982-89-U:** Ontario Public Service Employees Union (Applicant) v. Tanguay Place (Respondent) (*Withdrawn*)

**1008-89-U:** Laundry & Linen Drivers & Industrial Workers Union, 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Roytec Vinyl Ltd. (Respondent) (*Dismissed*)

**1160-89-U:** Labourers' International Union of North America, Local 837 (Complainant) v. International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers and George McMenemy (Respondents) v. A City Window Repair Company Ltd. (Interested Party) (*Withdrawn*)

**1307-89-U:** International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Complainant) v. Labourers' International Union of North America, Local 837 also Labourers' International Union of North America, Ontario Provincial District Council, and a City Window Repair Company Ltd. (Respondents) (*Withdrawn*)

**1529-89-U; 2189-89-U:** Teamsters Local No. 230, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Custom Concrete (Division of St. Lawrence Cement Inc.) (Respondent) (*Withdrawn*)

**1731-89-U:** Larry Carroll & Mike Kitchen (Complainants) v. Schneiders Employees' Association (Respondent) v. J. M. Schneider Inc. (Intervener) (*Dismissed*)

**2408-89-U; 2465-89-U; 2731-89-U; 0175-90-U:** Canadian Paperworkers Union (Complainant) v. Grant Industries Corp., and Grant Forest Products Corp. c.o.b. Grant Forest Products (Respondents) (*Dismissed*)

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*Ontario Labour Relations Board,  
400 University Avenue,  
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# ONTARIO LABOUR RELATIONS BOARD REPORTS



August 1990





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**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1990] OLRB REP. AUGUST**



**EDITOR: PERCIVAL S.C. TOOP**

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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**2841-88-JD** Millwright District Council of Ontario on its own behalf and on behalf of its Local 1244, Complainant v. **Acco Canadian Material Handling**, a Division of Babcock Industries Canada Inc. and Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, Respondents

Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Witness - Board power to compel the production of documents and to determine its own practice and procedure includes the power to direct that documents be made available for cross-examination - Board emphasizing the need to minimize document-related adjournments - Board directing further witnesses to bring documents relating to their testimony - Board directing respondent counsel to provide witnesses with copy of decision

**BEFORE:** *N. B. Satterfield*, Vice-Chair, and Board Members *D. A. MacDonald* and *S. Weslak*.

**APPEARANCES:** *N. L. Jesin*, *J. D. Watson* and *H. Martinak* for the complainant; *Fred Heerema* and *Anthony H. Allen* for Acco Canadian Material Handling, a Division of Babcock Industries Canada Inc.; *S.B.D. Wahl* and *F. Marr* for Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700.

**DECISION OF THE BOARD;** August 13, 1990

1. Counsel for the complainant ("the Millwrights") has asked the Board to direct counsel for the respondent trade unions ("the Ironworkers") to instruct certain witnesses to be called for the Ironworkers' case-in-chief to bring with them all documents in their possession or control relating to the matters about which they will be testifying, particularly, but not limited to documents relating to make-up of crews on all jobs about which they will be testifying and the man-hours worked by those crews. The witnesses about whom the direction is sought are those who will be testifying about jobs on which the work in dispute in this matter is alleged to have been performed. It is expected that their evidence will deal, amongst other things, with how the jobs were manned and the work in dispute was performed by members of either or both the Millwrights and Ironworkers. The request for the direction was made prior to the Millwrights' counsel beginning cross-examination of the Ironworkers' first witness. The Board reserved its ruling.

2. Clause (a) of subsection 103(2) of the *Labour Relations Act* gives the Board the express power to compel the production of "...such documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction...". Furthermore, subsection 102(13) which, in part, provides that "[t]he Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions...", makes the Board the master of its own practice and procedure. In this panel's view, therefore, it clearly has the power to direct the production of the documents which the Millwrights' counsel is seeking to have available for his cross-examination of the Ironworkers' witnesses. Counsel has requested only that the Board make a direction to have the documents available for his cross-examination of the Ironworkers' witnesses. The Board is satisfied that its power to compel the production of documents and to "...determine its own practice and procedure..." includes the power to direct that the documents be made available for cross-examination. The question is whether the Board ought to make the direction.

3. The documents which the Millwrights' counsel seeks to have available are not ones which are captured by earlier Board directions to the parties to produce documents in their posses-

sion or control on which they intended to rely. Counsel ordinarily would have two ways to assure that the documents sought would be available for cross-examination purposes. The first, and more usual way, would be for counsel to issue a summons to a witness which includes a direction to bring with him/her the identified documents. The difficulty with that approach in this case is that counsel does not know the identity of the witnesses or of the persons who are best able to testify as to the documents. The second method is for counsel to ask in advance for a direction to be made, as he has done here, thus avoiding the risk of later interruption of the hearings. Were the Board to refuse the request and were cross-examination to reveal the existence of documents of the kind for which the direction had been requested, the Board would direct their production if it was satisfied of their relevance. Should the witnesses not have them at the hearing, it might become necessary to adjourn the hearing in order to accommodate production. Hence it would seem more sensible to grant the request and avoid the potential for interrupting the hearings.

4. As the Board observed in *Ontario Bus Industries Inc.*, [1988] OLRB Rep. Sept. 914, at paragraph 13:

In recent years the Board has taken a number of steps to foster advance production of documents, *with a view to* promoting settlement discussions and *expediting the hearing process* by narrowing the issues in dispute and *minimizing the need for document related adjournments*.

[emphasis added]

The Board went on to discuss some of the steps and was convinced that, to direct the advance production of certain tape recordings, if they existed and if the party directed intended to rely on them, would expedite the hearing of the matter before the Board.

5. The Board and the parties in the instant proceedings already have invested 25 days of hearing in them and 11 more remain scheduled. In these circumstances and in all of the circumstances of this complaint, the Board is satisfied that making a direction which would make available, during examination of witnesses yet to be called, documents which they might be required to produce during their examination, would avoid the risk of document related adjournments and expedite the proceedings. For these reasons, the Board orders and directs any witnesses who are called by the Ironworkers to testify during their case-in-chief to bring with them all documents in their possession or control relating to any jobs about which they will be testifying, particularly, but not limited to, documents relating to the make-up of crews on such jobs and the man-hours worked by those crews. The Board further orders and directs counsel for the Ironworkers to provide copies of this decision forthwith to all of the witnesses whom it might be calling.
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**0079-90-FC National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 673, Applicant v. Bourque Consumer Electronics Service Inc., Respondent**

**First Contract Arbitration - Parties** - "Where the parties are unable to effect a first collective agreement" refers to union and employer parties to present application - First contract arbitration not precluded by an earlier collective agreement covering the same employees where the parties to that agreement were the employer and an employee association later displaced by the applicant union - Given the magnitude of concessions it was seeking, the employer's failure to provide financial data during bargaining was a failure to make reasonable or expeditious efforts to make a collective agreement - In the circumstances, this failure was also an uncompromising bargaining position without reasonable justification - First contract arbitration directed

**BEFORE:** *Bram Herlich*, Vice-Chair, and Board Members *M. Rozenberg* and *P. V. Grasso*.

**APPEARANCES:** *Paul Falzone*, *Brian Feil*, *Ralph Glass*, *Iain Farquharson* and *Val Di Meo* for the applicant; *Russel Zinn*, *Gino Sangiovanni* and *Peter Bourque* for the respondent.

**DECISION OF BRAM HERLICH, VICE-CHAIR, AND BOARD MEMBER P. V. GRASSO;**  
August 8, 1990

1. This is an application for a direction that a first collective agreement be settled by arbitration, pursuant to section 40a of the *Labour Relations Act*.

2. At the commencement of the hearing the respondent (also referred to as the "employer" or the "company") raised an issue which the parties agreed to deal with on a preliminary basis.

3. The position of the employer was that section 40a is not available to the applicant (also referred to as the "union") in this case. Although the parties have been unable to conclude their first collective agreement, the employer was party to a collective agreement with a union subsequently displaced by the applicant. In these circumstances, argues the employer, the provisions of section 40a are not available to the applicant and the Board should therefore dismiss the application on that basis.

4. As the applicant had not been advised of the employer's position prior to the commencement of the hearing, the matter was recessed until 3:00 p.m. on the first day of hearing to allow the union to prepare to meet the employer's objection. The parties made their submissions at that time and on April 22, 1990 a majority of the Board, panel member Rozenberg dissenting, issued the following decision:

For reasons to follow at a later date, the Board has determined that the employer's preliminary motion is hereby dismissed. Hearing in this matter will continue on May 1, 1990.

These, then, are our reasons for that ruling.

5. The parties were able to agree on the facts necessary for the purposes of the employer's preliminary motion. The employer purchased the business in the summer of 1988 from General Electric (hereinafter referred to as "GE") and was thereby a successor employer under section 63 of the *Labour Relations Act*. As a result of the sale the employer became party to an existing collective agreement between the predecessor employer and Aerospace and Electronic Communica-

tions Employee's Association (RCA-SPAR) (hereinafter referred to as the "Association"). The Association had been party to a number of collective agreements with GE and with its predecessor, RCA.

6. In the summer of 1988, subsequent to the expiry of the collective agreement, the Association commenced negotiations for a renewal of the agreement with the employer. The Association and employer were unsuccessful in negotiating a collective agreement. A number of bargaining unit employees then approached the applicant and a certification application was filed. Subsequent to a representation vote, the applicant was certified on March 29, 1989. The applicant and respondent commenced negotiations and used the former agreement between the employer and the Association as a basis for negotiations. In addition the union tabled further demands.

7. Section 40a(1) of the Act provides:

40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

8. The employer asserts that there are two conditions precedent to the right of the union to apply for the direction sought. The Minister must have issued a "no board" report - there is no dispute this condition has been met. This is not, however, argues the employer, a situation where "the parties are unable to effect a first collective agreement".

9. The employer urges the Board to find that section 40a is not available where there is a history of negotiated collective agreements and where there has been a collective agreement binding on the employer in respect of employees in the very bargaining unit in issue. The employer focuses on the phrase "a first collective agreement" and asserts that, given the history agreed to, the parties are not negotiating *a* first collective agreement. Even though this is the first time that these parties have attempted to negotiate a collective agreement, a resulting agreement would be *their*, not *a* first collective agreement. Had the Legislature intended to provide access to section 40a in a case such as the present one, the legislation would have used the phrase "their first collective agreement" rather than "a first collective agreement".

10. The employer asserted that section 40a was designed to address situations involving employees organized and certified for the first time although it conceded that the factors outlined in section 40a(2)(a)-(d) would not be exclusive to such a situation.

11. The employer also submitted that to accept the interpretation advanced by the union would greatly enlarge the scope of access to first contract arbitration. Employees would be encouraged to change bargaining agents for the sole purpose of gaining access to first contract arbitration.

12. The union asserted that what the employer is attempting to do, while not explicitly making the claim, is to ask the Board to treat the union as a successor union to the Association. It also focuses on the phrase "a first collective agreement" but asserts that in the context of the section the word *their* would have been redundant - it is the parties' inability to conclude a first collective agreement which triggers the right to make an application under section 40a(1). The parties have no ability to conclude anything other than *their* first collective agreement. The mischief which section 40a is meant to address will not occur exclusively in cases where employees are organized and certified for the first time.

13. As is evident from our earlier decision, the Board is of the view that the employer's preliminary motion must fail.

14. We are not convinced that the interpretation urged by the union will lead to changes of bargaining agents for the sole and express purpose of gaining access to first collective agreement applications. Neither are we persuaded that this has happened in the present case and consequently have no need to further address the Board's ability to deal with such a case. Similarly, except to note that the applicant is not a successor to the Association, we make no comment regarding the ability of a successor union to access section 40a where its predecessor had been a party to a collective agreement.

15. The issue we must address is the interpretation of section 40a(1) and, in particular, the phrase "[w]here the parties are unable to effect a first collective agreement".

16. The parties in the present case are the union and the employer, *not* the Association. Regardless of the collective bargaining history involving the Association, the employer and its predecessors, "the [present] parties" have clearly been unable to effect any collective agreement, first or otherwise. The only collective agreement which can be of any relevance for the purposes of section 40a(1) is an agreement between *the parties*. We thus conclude that the union is entitled pursuant to section 40a(1) to bring the present application.

17. We are fortified in our conclusion when we consider section 47 of the Act which provides:

47.-(1) Where the Board is satisfied that an employee because of his religious conviction or belief,

(a) objects to joining a trade union; or

(b) objects to the paying of dues or other assessments to a trade union,

the Board may order that the provisions of a collective agreement of the type mentioned in clause 46(1)(a) do not apply to such employee...

(2) Subsection (1) applies to employees in the employ of an employer *at the time a collective agreement containing a provision of the kind mentioned in subsection (1) is first entered into with that employer* and only during the life of such collective agreement, and does not apply to employees whose employment commences after the entering into of the collective agreement.

[emphasis added]

Section 47(2) restricts availability of religious exemption applications to the first time a collective agreement (containing certain provisions) is entered into with an employer. The section is not framed in terms of the parties to the agreement. Had the legislature intended to restrict the availability of first contract applications to the first time an employer is involved in collective bargaining, we would have expected language more similar to section 47(2) rather than the reference to "the parties" included in section 40a(1).

18. It was for these reasons that we dismissed the employer's preliminary objection.

19. On May 1 and 2, 1990 the hearing in this matter continued. A decision issued on May 7, 1990 wherein a majority of the Board, panel member Rozenberg dissenting, directed the settlement of the parties' first collective agreement by arbitration. These are our reasons for that direction.

20. The Board heard the evidence of three witnesses. Brian Feil, national representative of the union, was involved in and testified to all aspects of the union's negotiations with the respondent. Mr. Zinn, company counsel at the hearing in this matter, was one of the company's chief



negotiators during bargaining. The respondent did not call any witness directly involved in the negotiations. Pierre Bourque, who works in Ottawa and is president of the respondent company, testified with respect to his involvement in the matter. The employer also called Michel Laporte, a bargaining unit employee. Mr. Laporte chose not to participate in the strike called by the union and testified as to certain incidents which occurred during the course of the strike which commenced in October of 1989 and was continuing at the time of the hearing.

21. We observe at the outset that, with few exceptions, there were no significant disputes between the parties regarding the essential facts giving rise to the application. Having said that, we note that to the extent that Mr. Feil's evidence regarding events at and related to negotiation was uncontested, it is accepted by the Board. We note as well that Mr. Laporte was the only witness to testify out of first-hand knowledge as to certain events related to the strike and we accept his evidence as well. More will be said later regarding the evidence of Mr. Bourque and his relationship to the negotiations and the company negotiators.

22. Subsequent to certification, the parties met for their first negotiating meeting on or about July 10, 1989. At that meeting the union presented its proposals. The union based these proposals on the former collective agreement between the employer and the Association, making changes to reflect the new bargaining agent and adding certain items to demands which the Association had previously tabled. The company expressed some surprise and satisfaction at the fact that the union was willing to frame negotiations around the former agreement.

23. The Association, in June 1988, had sought 8% and 9% wage increases in a two-year agreement. Although the union initially adopted this proposal, the parties quickly moved to discussion of a three-year term and the union indicated it would be content with increases of 3% in each year. (The evidence is not clear, however, on precisely when the union first communicated that position to the employer.) There has been no general wage increase since June 1987.

24. The parties met again on August 10, 1989 at which time the employer tabled a comprehensive proposal. Substantial concessions were sought. For example, the company proposed significant reductions in wages although it proposed that its wage grid apply only to employees hired after ratification. More senior employees would see a 3% reduction in their existing hourly rate (or would be paid according to the grid, whichever was greater). The proposed wage rates were to remain frozen for the duration of the three-year contract. In addition, the employer proposed that the hours of work be increased from 37½ to 40 per week without any corresponding change to the weekly wage - this represented a further 6.6% reduction in wages.

25. It was therefore evident from the outset that the parties were far apart on economic issues. The company indicated that it was concerned about its financial situation. It emphasized the difference between its position as a stand-alone service operation and that of its predecessors who offered customer service and repairs as merely an adjunct to a manufacturing operation. Mr. Feil was, based on his own negotiating experience, somewhat skeptical of the company's claims of economic woe and accordingly asked for the opportunity to review the company's books. This request was denied from the outset and throughout the process as it was repeated. Mr. Bourque testified that as a private company the employer had no obligation to open its books to the union. The company asserted its lack of profit and, in the absence of any information provided by the union to the contrary, Mr. Bourque felt the company had no obligation to provide any further information.

26. Notwithstanding the wide gulf on economic matters, the parties were successful in resolving virtually all "language" or non-monetary items during the course of negotiations prior to conciliation.

27. Indeed, even prior to conciliation, the union thought a consensus had been reached to extend the hours of work to 40 per week and to pay overtime after 40 hours (rather than 37½). When the parties met for conciliation on September 11, 1989, it quickly became clear that the union had either misunderstood the company's position or the company had reneged on its agreement (we do not find it necessary to determine the appropriate characterization). The company did indeed want to extend the hours of work to 40 per week but it remained firm in (or returned to) the position that despite the increased hours there would be no corresponding increase in weekly wages. Negotiations quickly broke down and a "no board" report was subsequently issued.

28. On October 19, 1989 the union gave notice to the employer that it would commence a legal strike on Friday October 27, 1989 at 10:00 a.m. That strike commenced and continued up to the hearing date in this matter. The company has continued to operate using a combination of bargaining unit employees who chose not to participate in the strike and replacement employees.

29. The major issue leading to the strike was the company's demand that the work week be increased without any increase in weekly wage (henceforward referred to as "40 for 37½").

30. On the eve of the commencement of the strike the company sent the following letter to the union:

The company has now had the opportunity to review it [sic] bargaining position.

The company has made every reasonable attempt to negotiate and conclude a collective agreement with the CAW without the necessity of a strike or lock-out. The offer advanced to the union during conciliation was fair and reasonable given the circumstances as they then existed and the company's assessment of its economic position. Those circumstances have been altered considerably since that time.

The productivity of the Toronto operation has continued to deteriorate. It is an unprofitable operation. The company's financial position is less favourable than believed at the time of our final offer. The strike activity scheduled to commence tomorrow will no doubt also adversely affect the financial situation of the company. Accordingly this is to advise that effective immediately the company withdraws its last offer.

We shall be formulating a new and reduced offer in the coming days and will forward it to you in due course.

31. Approximately one month later the company did forward a new and reduced offer to the union which included the following changes to the company's position:

- (i) the Rand formula was to replace compulsory union membership
- (ii) two floating holidays to be deleted
- (iii) overtime not to be paid until after 44 hours work in a week
- (iv) elimination of 4 and 5 week vacation entitlements for senior employees
- (v) the wage grid would now apply to current as well as new employees with general increases of 0%, 2% and 2% in each of the 3 years of the agreement.

32. The employer's offer was unanimously rejected at a membership meeting.

33. Sometime early in the new year Mr. Feil contacted Mr. Zinn with a view to resuming negotiations. The union's proposal of interest arbitration was rejected and Mr. Zinn advised Mr. Feil that unless the union was prepared to agree to "40 for 37½" there was no point in resuming negotiations. Mr. Feil then met with the striking employees and received a mandate to agree to "40 for 37½" in order to get negotiations going. Negotiating meetings were then scheduled for February 15 and 16, 1990.

34. On February 13, 1990 Mr. Zinn transmitted the following letter by Fax to Mr. Feil:

I am informed by my client that your members on the picket line are again engaging in intimidation tactics and vandalism.

This morning one of the company's employees, Mike Laporte, was unable to bring his car into the company parking lot. Your members completely blocked the entrance to the driveway and would not allow him to pass. Mr. Laporte, as a consequence was required to park his car in a lot close to the company's premises. While parked in this lot his car was vandalized, the body was dented and the tires were slashed.

Also today, one of your members, Mr. Val Demeo verbally intimidated Mr. Trans as he arrived for work by stating to him, "If you keep working there you're looking for trouble."

You and I have previously spoken with respect to these threats by members on the picket line and the property damage experienced. You and I both know, although I do not expect that you will admit it, that the members on the picket line are responsible for this violence. I and my client believed that this gratuitous violence and vandalism by the picketers had ended.

The incident this morning, two days prior to the date planned for the resumption of negotiations, is simply inexcusable. I am to advise you that the company is not prepared to meet with you on Thursday for the purposes of receiving your proposal unless I receive from you no later than Noon tomorrow, February 14, 1990 a written undertaking that the CAW and its members at Bourque Consumer Electronics will not engage in acts of vandalism, violence or intimidation and will allow access to the company's parking lot by motor vehicles and pedestrians. If this written undertaking is not received by Noon tomorrow, we shall not be attending at the negotiation session.

I trust that this makes the company's position perfectly clear on this matter. Should you wish to discuss it please do not hesitate to contact me.

35. Mr. Feil received this letter upon his return to his office the following day some 20 minutes prior to the noon deadline imposed by the letter. Mr. Feil called Mr. Zinn's office to indicate a response would be forthcoming. Mr. Feil then contacted Mr. Farquharson, the president of the local and concluded, as a result of that conversation, that the allegations contained in Mr. Zinn's letter were unfounded. (This conclusion was later reinforced in his mind by conversations Mr. Feil had with bargaining unit employees on subsequent days.) Consequently, later that day, Mr. Feil transmitted the following letter by Fax:

I received your fax dated February 13, 1990 today at 11:40 a.m. February 14, 1990.

I have been unable to confirm the allegations but none the less I can ensure you this conduct is not condoned by the National Union.

I will further ensure that I will take whatever steps are necessary to prevent this kind of conduct in the future. It is our natural objective to maintain an orderly and peaceful picket line.

We are looking forward to meeting with you tomorrow at the Skyline Hotel at 10:00 a.m. Thursday, February 15, 1990.

36. Later in the same day Mr. Feil received the following reply:



I received your fax dated February 14, 1990 at 1:58 p.m., February 14, 1990.

You have previously given me your assurances that you would take whatever steps were necessary to prevent the sort of conduct referred to in letter of February 13th. Nonetheless, this conduct is continuing to occur. Therefore, I cannot accept the assurance indicated in the third paragraph of your letter. This does not respond in a meaningful way to the letter which I forwarded to you and in particular does not give me any assurance that your members will permit motor vehicles to pass through the picket line so that they may park in the company parking lot. In these circumstances and having failed to meet the conditions outlined in our earlier correspondence to you, we can advise you that we will not be meeting with you tomorrow and have advised the hotel that the reservation is cancelled.

37. The scheduled negotiations did not take place and on February 21, 1990 the union sent the following letter to the company:

I received your fax dated February 14, 1990 at 4:30 p.m.

It is the Union's position that due to the Company's cancellation of our scheduled meetings on February 15 and 16, that you are violating your duty to meet with the Union and bargain in good faith.

You will be receiving a copy of our application for first contract arbitration under Section (40 A) of the Labour Relations Act.

Your actions of February 14, 1990 are tantamount to "BAD FAITH" bargaining and you will be hearing from the Board in the very near future.

Your accusations outlined in your correspondence of February 13, 1990 are completely and totally unfounded and are merely an excuse to further frustrate the bargaining process. However, we do remain available to meet in an effort to achieve a collective agreement.

There was no reply to this letter and the present application was filed on April 6, 1990.

38. Section 40a(2) of the *Labour Relations Act* provides:

40a.-(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

39. The Board's general view of section 40a has been set out in *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005 at para. 16:

16. It is clear from these provisions that the legislature has acknowledged the significance to the collective bargaining relationship of the first contract, and has given statutory recognition to the potential difficulties that may be encountered in achieving it. This remedy does not supplant the primacy of the free bargaining process; rather, it recognizes that the negotiation of the first agreement may sometimes be thwarted by unjustified intransigence. Although this is remedial legislation and should be given a liberal construction and interpretation, the scheme of section

40a does not envision the automatically imposed settlement of a first collective agreement in all cases where the parties are unable to negotiate one. What it provides is access to this remedy where certain conditions precedent have been met. These conditions are enumerated in subsections (a)-(d) of section 40a(2).

40. The Board is required to direct first contract arbitration where it is satisfied that the process of collective bargaining has been unsuccessful because of one or more of the reasons enumerated in paragraphs (a)-(d) of subsection 40a(2).

41. The applicant asserts that the process of collective bargaining has been unsuccessful because of the uncompromising nature of the bargaining position adopted by the respondent without reasonable justification or because of the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement. The applicant also asserted that a direction should issue on the basis of section 40a(2)(d). However, in view of the conclusion we have arrived at in respect of section 40a(2)(b) and (c), we find it unnecessary to address this aspect of the applicant's case.

42. The respondent argues that the collective bargaining process has not been unsuccessful and, alternatively, any such lack of success is not attributable to the reasons which would justify the direction of first contract arbitration.

43. As the comments cited in *Nepean, supra*, indicate, first contract arbitration is not intended as a surrogate to the collective bargaining process. The parties to first agreement negotiations do not have automatic unilateral access to interest arbitration. It goes without saying that a collective agreement freely negotiated by the parties is preferable to one imposed by an independent third party. The Legislature has recognized, however, the pivotal importance of a first collective agreement to the ongoing stability of a collective bargaining relationship and has sought to remove some selected barriers which might otherwise preclude the consummation of a first collective agreement. Section 40a, however, does not relieve the obligation of *both* parties to make every reasonable effort to make a collective agreement. The Board will therefore not direct interest arbitration simply upon the request of a party. The parties must have travelled some distance along the collective bargaining route before recourse to section 40a will be available. Thus, the requirement that the conciliation process be complete and that the process of collective bargaining has been unsuccessful (for the enumerated reasons) are conditions precedent to issuance of a direction under the section.

44. The Board has dealt with the determination of what constitutes an unsuccessful collective bargaining process in a number of earlier cases. Like many terms charged with legal significance, a precise and comprehensive definition of what might otherwise be viewed as an everyday and simple word like "unsuccessful" may be somewhat elusive.

45. In cases such as *Teledyne Industries Canada Limited*, [1986] OLRB Rep. Oct. 1441 and *Juvenile Detention (Niagara) Inc.*, [1987] OLRB Rep. Jan. 66, the Board has dismissed first contract applications where it has concluded that the parties have invested insufficient energy into the bargaining process and where further negotiations appeared appropriate to deal with matters not yet fully canvassed. These cases essentially involve a determination by the Board that the applications were at least premature as a result of the bargaining process not having been exhausted.

46. In the present case we have no difficulty concluding that the collective bargaining process has been unsuccessful. The parties have had the opportunity to address all issues and, from this perspective, the application cannot be called premature. A strike has been in process for several months and the gulf between the parties on economic issues has been clear from the outset of

bargaining and has only broadened during the process. While there may be nothing intrinsically surprising, unlawful or unreasonable in a party's position becoming more rigid in the context of the exercise of economic sanctions, such a move may serve to highlight the impasse the parties have reached. Further, the refusal of the respondent to participate in further negotiations in the face of significant concessions by the applicant can hardly lead to conclusions other than impasse and lack of success in the collective bargaining process.

47. We must now consider whether the lack of success has been caused by any of the factors enumerated in section 40a(2). In our view, the process has been unsuccessful as a result of the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement. Some further and more detailed review of the evidence is required to explain our conclusion.

48. The employer on February 13, 1990 indicated that unless it received a written undertaking regarding conduct on the picket line it would not be attending the negotiating session scheduled for February 15 and 16, 1990. The employer's letter made certain allegations regarding picket line conduct.

49. This was not the first time that conduct on the picket line had been the subject of discussion between the parties. On December 7, 1989 the company wrote to Mr. Feil making certain allegations regarding conduct on the picket line. Mr. Feil consequently contacted Mr. Farquharson and also met with employees. He was assured that the picket line was being maintained in an orderly fashion and explained to Mr. Farquharson and the employees that the union could not and would not condone the kinds of acts described in the company's allegations. In any event, based on his periodic observation of the picket line and information provided to him by the participants, Mr. Feil concluded that the company's allegations were unfounded. Mr. Feil advised Mr. Zinn that the union would maintain a peaceful picket line.

50. At no time during the strike (either in December 1989 or in February 1990) were any charges laid as a result of picket line incidents and neither did the company take any legal action to restrain or restrict picket line activities.

51. Apart from Mr. Feil's evidence of a number of visits to the picket line, the only direct evidence before us came from Mr. Michel Laporte, an employee who has continued to work during the strike.

52. \* Mr. Laporte testified as to an incident which occurred within the first few weeks of the strike. Picketers apparently attempted to prevent him from driving his car into the company parking lot. He was subjected to verbal abuse and a skid was thrown at his car, although whether any contact was made or damage resulted was not disclosed to us. One picketer, who was not an employee of the company, opened Mr. Laporte's car door and attempted to pull him out. Nothing further appears to have resulted from this incident - there is no evidence that any civil or criminal proceedings resulted.

53. Mr. Laporte, within the first month or two of the commencement of the strike decided, quite sensibly in our view, to avoid any possible confrontation by parking his car elsewhere whenever employees were present on the picket line. Notwithstanding this, his car was subject to acts of vandalism (glue in door locks, punctured tires) at some unspecified times. Sometime in February Mr. Laporte found his car (which he had parked away from the company parking lot) had been subject to vandalism - a punctured tire, damage to the side marker light, a removed emblem, and a dent in the fender. This latter incident is the only evidence remotely related to the allegations contained in the company's letter of February 13, 1990 (cited *supra*).



54. We note that there is no evidence of any improprieties on the picket line on or about February 13, 1990. Further, while one may be tempted to draw inferences there is no direct evidence as to who was responsible for the damage to Mr. Laporte's car. The evidence simply does not disclose any substantial basis for the company's allegations. Even if it did, however, this would not alter our ultimate conclusion in this case.

55. On the strength of its allegations the company demanded a written undertaking regarding picket line conduct as a condition precedent to the resumption of negotiations. Even assuming that both the company's allegations and its imposition of this new condition were justified, we are of the view that Mr. Feil's written response of February 14, 1990 constituted full compliance with the company's demand.

56. Despite Mr. Feil's response, the company continued to refuse to participate in the scheduled negotiations. In determining whether a party is making reasonable and expeditious efforts to conclude a collective agreement, one should not consider events in complete isolation from the bargaining process as a whole. A single incident or moment of intransigence will not necessarily be sufficient to draw the conclusion resulting in the imposition of first contract arbitration. It is precisely the context in which the company decided to cancel the scheduled negotiations which so dramatically charges its refusal with significance. The major issue leading to the strike was the company's demand for "40 for 37½". The union had been on strike for nearly four months. Notwithstanding the strike the company appeared to be conducting its business as usual. The employees gave their negotiator a mandate to accept "40 for 37½" in an effort to get negotiations going and conclude the strike. The union therefore conceded on the major issue leading to the strike. In the face of that concession the company's refusal to negotiate can hardly be called reasonable.

57. If there were otherwise any doubt in our conclusion it is entirely dissipated by consideration of Mr. Bourque's testimony. He conceded that he was unaware of whether or not the company's allegations were substantiated but on the basis of reports received a decision was taken to cancel scheduled negotiations. He read Mr. Feil's reply and agreed that it indicated the union did not condone the kind of conduct alleged by the company. In examination-in-chief he testified that had the undertaking requested been provided the company would have gone to the negotiating table as scheduled. In cross-examination, when confronted with the fact that Mr. Feil had ensured that he would take whatever steps were necessary to prevent the kind of conduct alleged, Mr. Bourque responded that Mr. Feil had failed, that the picket line had been far from orderly from day one and he therefore questioned the value of Mr. Feil's undertaking.

58. Mr. Bourque's reply begs the question of why an undertaking had been requested. We are drawn to the conclusion that any response by Mr. Feil to the demand would have been deemed insufficient by company. The company's demand was tailor made to preserve its pretence for refusing to participate in negotiations at a crucial point in the process.

59. In summary, we are of the view that the company's refusal to negotiate in the face of the union's concession on the major strike issue constitutes a failure to make reasonable and expeditious efforts to conclude a collective agreement.

60. We are also of the view that the collective bargaining process has been unsuccessful because of the uncompromising bargaining position adopted by the respondent without reasonable justification. Section 40a(2)(b) requires the Board to assess the content of parties' negotiating proposals with a view to making an objective determination as to their reasonableness. The parameters of this inquiry were set out in *Formula Plastics Inc.*, [1987] OLRB Rep. May 702 at para. 24 et seq.:

24. ... in our view, "reasonable" must mean something more than simply a rational relationship between a bargaining position and a party's self-interest. This test is so minimal that it would make the relief provided by section 40a(2)(b) virtually inaccessible, a result which we find inconsistent with the remedial nature of this provision. Reviewing the section as a whole, and having regard to the Board's analysis in *Nepean Roof Truss, supra*, and *Juvenile Detention Centre (Niagara)*, [1987] OLRB Rep. Jan. 66, we find it difficult to conclude that the legislation was designed to do no more than ensure that parties were looking after their own interests in a logical way.

25. Rather, in our view, the word "reasonable" imports an objective element into our consideration of the respondent's justification for its position. It is not simply a matter of whether the justification is reasonable from the respondent's point of view, or even from the applicant's. The legislation draws us into an unavoidable assessment of whether a given proposal or position is reasonable in objective terms, a task which to some extent takes the Board into uncharted waters.

26. This is so, in part, because reasonableness is a relative concept; what is reasonable depends largely, if not entirely, upon the context in which such an examination is to be made. In considering section 40a(2)(b), such a context will include both the general landscape of labour relations and the specific labour relationship between the parties. In many cases such an assessment will also require the weighing and balancing of the opposing interests of the parties which they seek to pursue by way of their negotiating positions.

27. Moreover, while the Board has had occasion to scrutinize negotiations in the past, notably in the course of determining bad faith bargaining complaints, the nature of our inquiry under section 40a is significantly different. The jurisprudence developed under section 15 reflects a conscious intention to avoid reviewing the fairness or reasonableness of negotiating proposals as an exercise in itself (see for example, *Canada Trustco*, [1984] OLRB Rep. Oct. 1356). Rather, the Board's interest on a section 15 inquiry centers on whether a manifestly unreasonable proposal indicates the presence of bad faith on the part of a party, or a failure to make every reasonable effort to make a collective agreement. To the extent that section 40a requires us to examine the intrinsic reasonableness of a negotiating position, it represents a departure from the jurisprudence which has evolved under section 15.

28. The variety and social authority of the competing interests involved, together with the complex dynamics of the collective bargaining process make this task a difficult one. It requires a delicate assessment of the many differing factors which may be operating in and upon a given labour relationship, an assessment which must be approached from a perspective closely attuned to the practices and climate of labour relations at any particular point in time. Indeed, it is fair to say that this is a provision which will require the Board to draw heavily on its own expertise in labour relations.

61. The parties were able, with relative dispatch, to tentatively settle most, if not all, non-monetary items. The initial collective bargaining climate looked promising due in no small measure to the union's willingness to work from the former collective agreement between the employer and the Association. However, once the parties began dealing with monetary items, it quickly became evident that reaching an agreement would be a difficult task. Although many monetary issues eluded the agreement of the parties, it is not necessary for us to consider anything more than the employer's position on wages (including the demand of "40 for 37½") for the purposes of this decision.

62. From the outset the company indicated that it would be seeking significant monetary concessions. It asserted that as a stand-alone service operation it did not have the competitive edge of its predecessors. The company also maintained that productivity at the Toronto location was seriously lacking and that the operation was losing money. Moreover, the company tabled a wage survey of six employers employing persons performing similar work.

63. Consideration of this wage survey is a useful locus for describing some of the difficulties

resulting from the evidence the company chose to call or, more importantly, not to call. The evidence of Mr. Bourque was the only viva voce evidence called by the company in relation to the negotiations. Mr. Bourque works in Ottawa, the bargaining unit in question is located in Toronto. Mr. Bourque gave instructions and a general mandate to his chief negotiator, Mr. Zinn. Mr. Bourque was not involved on a day-to-day basis in either the operations of the company in Toronto or the negotiations that took place there. While there was obviously communication between Mr. Bourque and Mr. Zinn, it was clear from Mr. Bourque's evidence and, in particular, his cross-examination, that Mr. Bourque was not familiar with the specific details or developments in the negotiations. For example, while Mr. Bourque testified that Mr. Zinn was under instructions to meet with the union at any opportunity, he seemed unaware (or at least declined to acknowledge) that acceptance of "40 for 37½" had become a condition of any resumption in negotiations. In short, Mr. Bourque was unable to offer any meaningful evidence as to the step by step developments in the negotiating process.

64. Consistent with the above, neither did Mr. Bourque (nor anyone else) provide any evidence to explain the basis or significance of the wage survey provided to the union in negotiations. In any event, we also note that the schedule of wages proposed by the company appears to not even match what it has identified as the "industry average" based on its own survey.

65. More important, in our view, than the survey the company did provide in negotiations, is the information it failed and refused to provide. The company declined several union requests for economic data to support the company assertions. Considering the magnitude of economic concession sought, we view this failure as unreasonable on the company's part. So long as the company refused to provide such information, the union's skepticism regarding the company's claim could hardly be expected to abate. In the circumstances of this case we find the company's refusal to be a further failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement.

66. Not only did the company fail to provide any data justifying its economic position during the course of negotiations, it also failed (apart from an assertion, later proved false, by Mr. Bourque that following a year of marginal profit throughout the entire business, the Toronto operation had lost in the range of \$200,000 in the six months ending October 31, 1989) to provide any such information either as part of documentation filed or evidence tendered in support of its case. It was only as a result of cross-examination by the union and the union's consent to entering in evidence of a document not previously filed in accordance with Practice Note 18, that any specific economic data was brought to the attention of the union or the Board.

67. The document filed was prepared internally and was a handwritten sheet of paper titled "Income Statement" for the six-month period ending October 31, 1989. It reads as follows:



BCES Inc  
Income Statement  
Toronto

Form B  
Income Statement  
Approved by  
Accountant

	2	3	4
		② Oct 31/89	
1			
2	Sales - Service	360453 <sup>15</sup>	
3	Sales - Contracts	248888 <sup>66</sup>	
4	Sales - Parts - Incl	7509 <sup>25</sup>	
5	- Cons	30252 <sup>11</sup>	
6		647103 <sup>17</sup>	
7			
8	C.O.S - Parts - Service	73121 <sup>01</sup>	
9	- Parts - D	56321 <sup>00</sup>	
10	- Parts - C	13613 <sup>44</sup>	
11	C.O.S - Labour & Benefit	345472 <sup>82</sup>	
12		437839 <sup>27</sup>	
13			
14	Gross Margin	209263 <sup>90</sup>	(32%)
15			
16			
17	<u>Expenses</u>		
18			
19	Advertising	624 <sup>79</sup>	
20	Bad Debts	673 <sup>92</sup>	
21	Business Taxes	18171 <sup>09</sup>	
22	Commissions - C/C	1671 <sup>33</sup>	
23	Commissions - Sales	4912 <sup>71</sup>	
24	Indirect Exp. Land	2674 <sup>70</sup>	
25	Equip. Rental	2167 <sup>05</sup>	
26	Shipping	(531 <sup>69</sup> )	
27	Product Labour	64953 <sup>08</sup>	
28	Insurance	1523 <sup>88</sup>	
29	Maintenance - Build	6265 <sup>30</sup>	
30	Maintenance - Equip	1328 <sup>88</sup>	
31	Misc.	520 <sup>49</sup>	
32	Overtime	191 <sup>97</sup>	
33	Postage	(510 <sup>37</sup> )	
34	Prof. Fees	29732 <sup>25</sup>	
35	Prop. Taxes	19714 <sup>16</sup>	
36	Rent	57056 <sup>25</sup>	
37	Office Supplies	2850 <sup>98</sup>	
38	Telephone	10382 <sup>89</sup>	
39	Tolls	207 <sup>33</sup>	
40	Travel	2622 <sup>21</sup>	
41	Utilities	9479 <sup>22</sup>	
42	Living Expenses	16516 <sup>02</sup>	
43	Vehicle Expenses	58782 <sup>82</sup>	
44		312041 <sup>53</sup>	
45			
46	Net (Loss)	(102777 <sup>63</sup> )	

68. Section 40a(2)(b) speaks of the uncompromising nature of any bargaining position adopted without reasonable justification. The employer commenced negotiations by proposing a new wage grid to apply to all new employees, current employees would have their rates red-circled subject to a 3% wage reduction. The employer's initial position fluctuated between no increases and a 2% wage increase in the third year of the contract. In addition was the demand for "40 for 37½" which constituted a further wage reduction of 6.6%. After the commencement of the strike the employer modified its proposal so that the new wage grid would apply to all existing employees in the technician classifications representing a wage reduction of approximately 25% for many employees.

69. While there may be nothing inherently surprising, unreasonable or unlawful in a party presenting a less generous offer in the face of the exercise of economic sanctions, we are unable to see any reasonable justification offered by the employer at any point in the bargaining process for its position on wages. The dramatic and subsequent extreme demands for concessions were such that one would have expected some economic data to have been presented to the union, particularly in view of its repeated requests. Neither are we of the view that the presentation of limited economic data at the hearing cures the earlier lack. Section 40a requires the Board to assess the bargaining process; just as first contract arbitration ought not to be viewed as an automatic surrogate to collective bargaining, a respondent to a section 40a application ought not to assume that the hearing is an opportunity to cure its prior intransigence. Section 40a should create an incentive to the parties to bargain in the utmost good faith, it should not encourage either party to withhold vital information or otherwise save its "bottom line" position until such time as the matter is brought before the Board.

70. In any event, we are not persuaded that the handwritten income statement provided by the company at the hearing could provide ex post facto justification for its extreme and uncompromising bargaining position. The apparently hastily prepared statement covering a period of six months is simply not sufficient. The company acknowledged that the prior year had been profitable. The statement includes a number of expenses which the evidence indicates are properly viewed as exceptional single instances. In this context we are unable to conclude that there is any reasonable justification for the uncompromising nature of the bargaining position adopted by the employer.

71. It may well be that the employer was and continues to be in serious economic difficulty. However, on the evidence provided to us, we are unable to arrive at such a conclusion. It is certain, however, that apart from assertions about which the union was understandably skeptical, no such justification was provided to the union, despite its numerous requests, during the bargaining process.

72. In summary, given the magnitude of the concessions it was seeking, the employer's failure to respond to union requests for financial data during the bargaining process constitutes a failure to make reasonable or expeditious efforts to conclude a collective agreement; in addition, its failure to provide reasonable justification, in bargaining or at the hearing, for its uncompromising bargaining position has also contributed to the collective bargaining process being unsuccessful.

73. For all of the above reasons we concluded that the conditions set out in section 40a(2)(b) and (c) had been met and consequently directed, by decision dated May 7, 1990, that the parties' first collective agreement be settled by arbitration.

I dissent from the majority decision on two points: (i) section 40a is not applicable to a displacement situation; and (ii) the evidence does not justify an order under section 40a even if I were to agree that section 40a were to apply.

Section 40a was enacted in May 1986 by the Ontario Legislature to remedy difficulties encountered in situations where employees, newly unionized and unfamiliar with the collective bargaining process, find themselves dealing with an employer who is unwilling to accept having a unionized work place, and who attempts through collective bargaining to defeat the fledgling trade union before it has established itself. It was designed to be used as a shield to provide protection in situations involving employees organized and certified for the first time.

Given the history agreed to by the parties and recited in paragraphs 5 and 6 of the majority decision, this is not a first collective agreement situation. There has been a history of negotiated collective agreements with a predecessor union (Aerospace and Electronic Communications Employee's Association (RCA-SPAR) which had proved full trade union status before the Board in 1983. The predecessor union, which had been in a continuous existing bargaining relationship with the employer and the predecessor employers, found itself unable to obtain what it wanted through collective bargaining. The CAW displaced the predecessor union through a representation vote between the two unions, and then, during the course of its negotiations, the CAW found itself in the same situation as the predecessor union. The majority in its decision has granted the CAW the opportunity to use section 40a as a sword, to obtain from the Labour Board that which it could not obtain during a strike or at the bargaining table, and that which could not be obtained by the predecessor union because its right to first agreement arbitration was extinguished. To allow the CAW union to come to the Labour Board and get what both it and the displaced union could not get in bargaining, would be extending the application of section 40a and could encourage more displacement applications designed to thwart the necessity to bargain in good faith. In the best interests of public policy, it is of utmost importance to confine the use of section 40a as a shield - the purpose for which it was intended - and not to extend its use as a sword, which would be detrimental to the furtherment of harmonious relations, and to the practice of free collective bargaining.

Section 40a speaks of "parties (who) are unable to effect a first collective agreement". The "parties" to a collective agreement are the employer and the trade union as the *bargaining agent* representing the bargaining unit of employees. There are, however, *three principals* in the relationship: the employer; the bargaining unit of employees; and the trade union which is the *bargaining agent* for the unit of employees and which has institutional interests of its own. The use of the word "first" has to have some meaning. In the instant case, the employer and the bargaining unit of employees are *not* trying to effect their (or a) first collective agreement. That happened long ago before the CAW appeared on the scene to act as the *bargaining agent*. The mere change of a *bargaining agent* cannot change the meaning of "first". Therefore, on their face, the agreed facts do not fit within the parameters required by section 40a.

The Board has stated in previous decisions that the remedy provided by section 40a does not supplant the free collective bargaining process and that the scheme of section 40a does not envisage or contemplate the automatic imposition of a first collective agreement simply because the parties have been unable to negotiate one. Yet, with due respect to my colleagues, what the majority has effectively done is substitute a section 40a finding for free collective bargaining; something which the Board has said section 40a was never intended to do. First agreement arbitration was never intended to be a standard response to the breakdown of collective bargaining. Nor does the Ontario Labour Relations Act guarantee that a collective agreement must be reached. Nor does the possibility of section 40a intervention absolve either of the parties of their obligations and duty to do all that is within their power to conclude a collective agreement. I suggest that the duties and



obligations of both parties must be active and not simply passive. For the one party to merely write a letter advising the other party that it remains available to meet and then to sit back and just wait, does not, in my opinion meet all of its obligations.

After hearing the evidence, the allegations appear to be more in the nature of a section 15 complaint (which the union actually stated to the employer written in the same aforementioned correspondence when it advised the employer that it applied for a section 40a direction - see paragraph 37) than in a section 40a application. In this fact situation, such facts do not justify an order under section 40a even if I agreed that section 40a should apply. The trade union in this instance short circuited the collective bargaining process by applying for a section 40a direction.

In addition it should be noted, the union did not file, under the Act, any allegations of wrong doing or bad faith bargaining against the employer at any time during negotiations or following the alleged breakdown of negotiations, or at any period during of these hearings.

The evidence submitted by the employer indicated that it engaged in collective bargaining with other unions in Calgary and Montreal and had concluded collective agreements. It was also engaged in negotiations in Vancouver and was working towards concluding a collective agreement there. Although details of these negotiations were not put into evidence, the company had taken the same pragmatic approach for economic reasons in these negotiations as it had with negotiations in Toronto. The CAW did not challenge, dispute or discount this evidence.

In summary, I am of the opinion, that the majority decision effectively makes new law by allowing section 40a to be invoked in a situation not intended by the Legislature. In doing so, the Board exceeds its jurisdiction.

Moreover, the evidence concerning the bargaining relationship between Bourque and the CAW is not such as to warrant acceding to the request for first contract arbitration even if section 40a did apply.

For all the reasons stated above, I believe the majority decision goes far beyond what was intended in the first contract arbitration legislation.

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**0002-90-R; 3284-89-R** Antonio Bertucci, Applicant v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Respondent v. **Cedarvale Woodworking Limited**, Intervener

Bargaining Rights - Evidence - Representation Vote - Termination - Voluntary Recognition - Termination application brought within first year of voluntary recognition - Majority support in union cards signed at time of recognition is sufficient evidence to create a rebuttable presumption of union entitlement to representation - Act not anticipating representation vote except where there is uncertainty of employee wishes at the time of recognition agreement - Board declining to hold vote and dismissing application

**BEFORE:** *K. G. O'Neil*, Vice-Chair, and Board Members *J. A. Ronson* and *P. V. Grasso*.

**APPEARANCES:** *C. J. Abbass* and *Antonio Bertucci* for the applicant; *Brian Sheehan* and *Dory Smith* for the respondent; *Vincent P. Johnston* and *Pat Bertucci* for the intervener.

**DECISION OF THE BOARD;** August 31, 1990

1. The name of the respondent is amended to read: "Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America".
2. This is an application for termination of the respondent's bargaining rights filed under both section 57 and section 60. The relevant bargaining rights derive from a voluntary recognition agreement. No collective agreement has been signed.
3. As a preliminary matter, the respondent objected to the applicant's bringing an application under section 57 and asked that it be dismissed. Section 57(1) provides as follows:

57.-(1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

It was argued that section 57 was not applicable to a voluntary recognition situation, since it makes reference only to certification. The respondent relied on *The Sigal Shirt Company Limited*, [1982] OLRB Rep. Nov. 1720.

4. The applicants took the position that they should be able to use section 57, although counsel acknowledged it was not the usual situation under section 57. Mr. Abbass argued that Mr. Sheehan's interpretation of the Act as a whole was not accurate. He argued that section 57 was for the purpose of giving the union a year to negotiate without fighting off a termination application but that section 60 was for the different purpose of addressing the legislature's concern over "sweetheart unions". Therefore, the legislature provided a mechanism to, after the fact, prove support. Mr. Abbass asked us to reserve on the preliminary matter until we had heard all the evidence on both applications, which would include the petition filed in support of the application under section 57.

5. Mr. Sheehan argued in reply that voluntary recognition is only contemplated by the Act in limited circumstances and it does not bestow all the same rights as certification. He thought that this should not be treated as a gap in the legislation but rather as a decision, on balance, that the legislature intended voluntary recognition agreements to be treated in this way.

6. Mr. Sheehan said that the fact that a union with a voluntary recognition agreement can be "raided" is an incentive for the union with the voluntary recognition agreement to get a collective agreement quickly. He acknowledged that under section 60 the circumstance is usually that of a raid. Further, he said that he could not see the harm done by the different focus of sections 57 and 60. If the union sits on its rights there are essentially no consequences for the employer or the employees. The freeze does not kick in and there is no collective agreement. If the employees want to be represented by another union they can do so. In the meantime they pay no union dues.

7. The Board ruled orally that certification was a pre-condition to an application under section 57(1) and therefore we would not hear the evidence of the petition supporting the application under section 57(1), but rather would hear the application under section 60.

8. Mr. Abbass also argued that we should hear the evidence on the petition in the context of the section 60 application, so that we could see that a majority of the present bargaining unit

were not in favour of continued representation of the union. He referred to *The Sigal Shirt Company Limited, supra* for the proposition that we could grant a representation vote where there was uncertainty as to the union's entitlement to represent the employees. He submitted that evidence of membership cards, not accepted and scrutinized in the normal manner as in a certification application, would create uncertainty. Mr. Abbass submitted that the Board could not make a determination today as to whether the cards were valid, that that would have had to have been done in March of 1989. The Board ruled orally that evidence of a petition signed in the spring of 1990 was not of probative value on the issue before us under section 60 which is the union's entitlement to represent the employees in March of 1989.

9. The union's only witness was Dory Smith, Business Representative and Vice-President of the Carpenters' Local 27, a position he has held for four years. His job is to organize unorganized workplaces. In this capacity he was involved in the organizing campaign at Cedarvale in February of 1989. Since a majority of the employees had become members, a certification application was submitted on February 24, 1989. Membership cards and receipts were submitted for 11 employees, of which 9 were good cards. However, the membership evidence was apparently sent by registered mail after the terminal date fixed for the application. The employer nonetheless filed a list showing 11 people in the bargaining unit. The certification application, the cards, the employee list and the voluntary recognition agreement were entered into evidence.

10. On the day of the hearing, March 31, 1989, the certification application and a related section 89 complaint were resolved by way of a settlement which was filed with the Board. The section 89 complaint was withdrawn and provisions were made for the recall and compensation of certain affected employees. Layoffs were to be by seniority except that Antonio and Sal Bertucci were to be the last laid off. The company voluntarily recognized the union as the exclusive bargaining agent for all employees in the following bargaining unit:

all employees of the respondent at its plant at Concord, Ontario, save and except non-working foremen, persons above the rank of foreman, office clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation.

11. Mr. Smith testified that at the time of the settlement which included the voluntary recognition agreement, there was discussion that they could merely re-submit the membership evidence if necessary and since the employer agreed that the union had majority support he decided that he might as well give recognition. Prior to March 31, the date of the voluntary recognition agreement, no petition had been filed against the certification application and no one had contacted Mr. Smith for a retraction of a card. Mr. Smith was not sure what people were at work on the date of the voluntary agreement. In cross-examination, Mr. Smith denied that he knew that half the bargaining unit would be laid off on the Monday after the voluntary recognition agreement. The employer laid off a number of people in April because he had lost his major client. Mr. Smith testified that subsequent to the voluntary recognition agreement he tried to bargain on many occasions with the employer and took him a copy of the provincial collective agreement. The employer told Mr. Smith that there was no business and that he would negotiate when he recalled the employees. The employer went so far as to ask Mr. Smith to refer him whatever business he could and gave him business cards.

12. The employer called Pat Bertucci, one of Cedarvale's owners, as a witness. He has been a Vice-President of Cedarvale Woodworking for six to seven years and does general management of the company. He and his sister Sarah, who was the office manager, attended at the Board on the hearing date of March 31, 1989. He was of the view that a major motivation for the voluntary recognition agreement was that he had been cautious about laying people off during the freeze period



and specifically was bargaining for the ability to lay off people. On April 3, 1989, the Monday morning after the voluntary recognition agreement, he laid off four people by seniority, and one person quit. Since then he has attempted to recall these people and none has returned. He has subsequently hired two additional people. He did not give any evidence which contradicted Mr. Smith's on the question of majority support.

13. Antonio Bertucci, the applicant and circulator of the petition supporting the section 57 application, also gave evidence. He is not involved in the management of the plant, as are his father and brother, but works there and did so in March of 1989. He had discussions about the union with other people in the shop after the notice of the certification application went up and it was his view that all the employees were convinced about the union: "They didn't want to hear no argument". The only person he had ever seen from the union after that was Dory Smith on a day that he went through the plant. He heard nothing further from the union for a long time. He then heard his brother and father, who run the company, speaking about the union and saying that their hands were tied. That was when he took it on himself to get legal representation and bring the applications under section 57 and 60. His father and brother told him that they could not do or say anything about it. It was his view that until he mentioned it the new employees did not know the union was in the plant. Mr. Bertucci gathered signatures on a petition in March, 1990.

14. Mr. Sheehan submitted that the evidence before us was sufficient to establish that the union was entitled to represent the employees at the time of the voluntary recognition agreement. He referred to *TRS Food Services Limited*, [1980] OLRB Rep. Mar. 1360 and *Spring Plastering*, [1967] OLRB Rep. Dec. 887. He said that the general approach of the Board is to determine whether the union had sufficient support of a majority of employees. The evidence here is that 10 cards were submitted which matched names of the 11 employees in the bargaining unit submitted by the employer. Together with the evidence that no petition had been filed and no request for revocation had been received, the Board was urged to rely on this as evidence for a finding under section 60. In answer to Mr. Abbass' submission that the fact that the Board had not scrutinized the cards in the way it would under a certification application, Mr. Sheehan submitted that this would require a certification application as a necessary pre-condition to an application under section 60. This would be contrary to the Board's jurisprudence in which it has indicated that under section 60 membership evidence is not required. He also asked us to consider the evidence of Pat Bertucci that the men wanted to be certified at the time and also of Antonio Bertucci that when he raised the issue with any of the employees they were solidly convinced in favour of the union.

15. For the intervener employer, Mr. Johnston argued that the cards by themselves were not enough to prove the majority support required by section 60. In this regard he referred to *Eugene Marks*, [1987] OLRB Rep. June 872 for the proposition that membership evidence is a rebuttable presumption, which we should find has been rebutted in this case. He does not admit that the cards are membership evidence. He submitted in this regard that there were no questions directed to Mr. Smith as to whether he had seen the employees sign, whether they understood what they were signing and whether they had paid a dollar.

16. Further, we were asked to find that Mr. Smith was not a credible witness as he said he did not know that the employer was going to lay off half the bargaining unit on Monday. Since he collected most of the cards and he is not believable, we were asked to infer that there is a cloud over his evidence and it should not be accepted. He asked us to draw an inference from the fact that there were layoffs the next business day after the settlement that the union was not entitled to be represented by the union.

17. In the alternative, counsel argues that on policy grounds we should grant the applica-

tion. In a general plea for avoiding an overly technical approach, we were invited to fashion an appropriate remedy for these facts. In this regard he cited *Genaire Ltd. v. International Association of Machinist*, 14 D.L.R. (2d) 201 and *DeVuono and Gallucci*, [1965] OLRB Rep. April 59. Mr. Johnston asked us to take the preamble of the Act and section 3, the freedom to join or not to join a trade union, as our starting point. The basic thrust of the scheme of the Act is to protect the employees' ability to make their own choice and therefore we should find a way to allow these employees to express their choice. He relied on paragraph 3 of *A. R. Milne Electric*, [1982] OLRB Rep. June 911 for the proposition that employees should not be locked into a bargaining relationship. He referred to the amount of turnover in this bargaining unit and asserted that all of the people who signed cards were now gone. We are asked to read sections 57 and 60 together to find that a voluntary agreement is null and void after one year. We were invited to infer this from an overall reading of sections 56 to 60 which always grant the possibility of relief. If you miss one kind of application you can come back again. Counsel argues that if section 60 is read as granting no relief after one year, the employees are locked in and cannot rid themselves of their bargaining agent.

18. Employer counsel submits that under section 5(3), if another union can come in, the implication is that no voluntary agreement would still be in place. It was argued that policy allows us to fashion a similar remedy under section 60(1). Counsel submits that the employees' rights are so inextricably bound up with the union's rights under section 5(3) that the Board must have such a power.

19. We were asked to look at the application as a member of the bargaining unit, one of the people whom section 3 is aimed at. From this point of view, the union did nothing for a year on behalf of the employee. Counsel queried whether section 60 was designed to let the union get rights and indefinitely sit on them. He submitted that that would be the very harmful result to the people the Act is designed to protect. Further, he argued that since the general legislation is remedial, we should interpret it in favour of the individual rather than the state and that any doubt should be resolved in favour of the employee.

20. In the further alternative we were asked to hold a vote under section 60(2). In the employer's view a vote would resolve uncertainty in the evidence of membership, which it regards as doubtful. Further, a year has gone by, and the current employees are different. Given the problem these employees have bringing an application under section 57, we should order a vote in any event.

21. In reply, Mr. Sheehan said that Mr. Johnston's argument was equivalent to saying that the union had abandoned its rights but had not challenged Mr. Smith on his attempts to bargain with Mr. Bertucci. (Neither the applicant nor the employer asked the Board to find that the union had abandoned its rights and therefore we do not see abandonment as an issue in this case). Mr. Sheehan submitted that Mr. Smith was attempting to take cognizance of Mr. Bertucci's financial situation. He did not think it appropriate that a union should have its cooperation with the employer used against him. He relied on *Eugene Marks*, *supra* as well and said that the membership evidence was a rebuttable presumption but in this case it had not been rebutted. The facts here are very different from that case. In that case there had been a petition on the original certification application and the question before the Board was whether or not it should be considered under a subsequent section 60 application. The Board saw no reason why it should not. Those are not similar to the facts of this case.

22. As to Mr. Johnston's policy argument, Mr. Sheehan argues that the Board has no jurisdiction to rewrite the statute in that manner.

23. As to the broad policy concern raised by employer counsel, Mr. Sheehan submits that

there is no mischief to be remedied. The employees can be certified by someone else if they think they've been abandoned. In the meantime there are no consequences. Antonio Bertucci said there was no effect on him. The only way he realized there was any problem was when his brother and father were talking about the union. Mr. Sheehan finds it difficult to see the great need for relief that Mr. Johnston's creative drafting would suggest there was. In any event, he submits, this would mean that an employer could simply stretch things out for a year and succeed automatically after having a voluntary recognition agreement.

24. Mr. Abbass adopted Mr. Johnston's submissions and said that the onus was on the union to show that they were entitled to represent, not just that they had cards. Here where there was no collective agreement, no conciliation, no first collective agreement application, no meetings with the employees and no notice to the employees after March 1989, we are entitled to take that conduct into account and look at the recognition agreement and the conditions under which it was entered into. The membership evidence was not sent in on time. The onus is on the union, not on the applicant.

25. The question before the Board concerns the proper interpretation of section 60. Subsections (1) and (3) of section 60 provide as follows:

60.-(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 16(3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

(2) Before disposing of an application under subsection (1), the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.

(3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

26. The Board's jurisprudence under section 60 is not extensive. *Eugene Marks, supra*, contains a discussion of the role of membership evidence as follows:

... The Act does not expressly prescribe the circumstances in which a union which has not been certified as exclusive bargaining agent for a unit of employees can nevertheless be said to be "entitled" to represent them. It is obvious that the situations in which such an entitlement can be found are not limited to those in which bargaining rights arise by operation of subsection 1(4), section 62 or section 63, since the Act contained the equivalent of section 60 before the predecessors of those provisions were added to it. The general scheme of the Act is that a union will be entitled to represent a unit of employees in collective bargaining with their employer if a majority of employees in the unit wish to be so represented by that union. The Board has interpreted the words "entitled to represent the employees in the bargaining unit" in a manner consistent with that general scheme.

9. In *Spring Plastering Limited*, [1967] OLRB Rep. Dec. 887, the Board observed that:

10. ... on an application for termination of bargaining rights under section 60, all the parties to the collective agreement must do is establish that the union was "entitled to represent employees" at the time the collective agreement was entered into. Evidence that the trade union was entitled to represent the employees may well take a different form from the evidence of membership required on an application for certification. It



must be remembered that any documentary evidence of the right of a trade union to represent employees was not necessarily prepared with a view of applying for certification and accordingly *could reflect the desire of the employees to have the union represent them without complying with the Board's stringent tests of membership.*

[emphasis added]

In *Gilbarco Canada Ltd.*, [1971] OLRB Rep. Mar. 155, the Board said:

16... the requirements of section 45a [now 60] of the Labour Relations Act, do not require membership. Section 45a speaks of representation as opposed to section 7 of the Act which refers to membership ... Accordingly, in assessing applications under section 45a the requirements of membership which obtain in applications for certification do not obtain *although membership may be some evidence of representation.*

[emphasis added]

In *Gilbarco*, the Board found that the union was entitled to represent a unit of employees because a majority of them had ratified a proposed collective agreement between it and their employer. In *York County Quality Foods Ltd.*, [1984] OLRB Rep. Sept. 1340, the Board found that the onus imposed by subsection 60(3) had been satisfied by evidence that the collective agreements under attack had been ratified at a meeting of employees called and held in such a manner that the Board concluded that the ratification reflected the will of the majority. It is clear from these cases that, for the purpose of section 60, the union's entitlement to represent employees at a particular time turns on whether at that time a majority of them wished to be represented by it in collective bargaining with their employer. The question whether or not the employees were members of the union at the relevant time (in fact or by statutory definition) is only relevant because an employee's membership (or application for membership) in a trade union is evidence of the employee's wishes with respect to representation by that trade union.

...

12. Neither these nor any of the other cases cited by counsel for the union support the proposition that evidence that a majority of employees in the unit were members of the respondent union at that time the employer granted it recognition is *conclusive* of the question whether at that time the union was "entitled to represent the employees in the bargaining unit" for the purposes of section 60. We are not aware of any decision which supports that proposition. The analysis in *Trent Metals Limited*, [1979] OLRB Rep. Aug. 827, seems inconsistent with it. In any event, the proposition is inconsistent with the general scheme of the Act, and we reject it. Evidence of their membership in a trade union is rebuttable, not conclusive, evidence of the desire of employees to be represented by that trade union in collective bargaining with their employer.

27. Thus, unless there is adequate evidence to rebut the presumption, membership cards are sufficient evidence of entitlement to representation. The evidence before us did not rebut that presumption; it indicated it was warranted.

28. Other cases where cards were accepted as membership evidence include *Spring Plastering Limited*, [1967] OLRB Rep. Dec. 887. However, evidence of membership may be sufficient but is not necessary to prove entitlement to represent employees. See *Gilbarco Canada Ltd.*, [1971] OLRB Rep. March 155, decided under section 45a(1), a predecessor to section 60. There the allegation was that there were deficiencies in the membership evidence. The Board held at paragraph 16 that the requirements of membership which obtain in applications for certification do not obtain although membership may be some evidence of representation. The Board found that the employees had freely selected a trade union and participated in the processes leading to the signing of a collective agreement and that this was a situation which was not of the kind against which the section protects employees.

29. In the facts before us, there is no evidence of any factor which would lead us to doubt

that the membership cards submitted indicate that the employees signing them were freely selecting a trade union to represent them. Indeed, the evidence of the applicant, as noted above, supports the idea that the employees were firmly in favour of union representation at the time.

30. Section 60(2) gives us the discretion to hold a vote where we consider it appropriate but we decline to do so. In this case, the evidence is sufficiently cogent that we are able to make a finding that the union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into. The evidence of the membership cards, together with the evidence of the two Mr. Bertucci's is better evidence of entitlement to represent as of the relevant date than information which could be gained from a representation vote well over a year later.

31. *The Sigal Shirt Company Limited, supra*, was an application for reconsideration of a decision of the Board that had dismissed an application under section 60. The reconsideration application asked for a representation vote in the alternative and supported this request by a petition. The Board refused the application on the basis that there was nothing contained in the request for reconsideration which would have, even if presented prior to its decision, led to another conclusion. In particular, it underlined that section 60 does not anticipate a representation vote except where there is uncertainty as to employee wishes at the time that the voluntary recognition agreement was entered into. At paragraph 6 the Board said as follows:

This section [60(1)] does not give the Board a general power to resort to a Board-supervised vote as an aid in resolving a question of employee wishes where the evidence shows that at the relevant time... the respondent was entitled (in this case majority support) to represent the employees in the bargaining unit. The signatories to the petition may well have wished to show they no longer support the respondent. However, this has no effect on a section 60 application in that the relevant time for determining the entitlement of the respondent to representation rights is the date when the recognition agreement was entered into. A representation vote can only be ordered where there is a lack of certainty as to the entitlement as of that date and a vote is necessary to resolve that uncertainty. In this case there is no uncertainty because the applicant, through her counsel, conceded that on [the date of the voluntary recognition agreement], the respondent had as members 46 of the 87 employees acknowledged to constitute the bargaining unit.

32. We also note that we find no merit in the argument that the layoff immediately following the recognition agreement sheds light on whether or not the union was entitled to represent the employees on the day the voluntary recognition agreement was signed. This argument seems to imply that a union who is unable to prevent layoffs is not entitled to represent its members. We do not accept this proposition. Furthermore, the fact that a condition of signing the voluntary recognition agreement was that layoff would be in order of seniority is evidence of the assertion of representation rights at that time.

33. Nor do we consider that we have the jurisdiction to interpret the Act in the manner Mr. Johnston suggests. The language of section 60 is clear. There is no conflict between sections 57 and 60 in our view and therefore no room for the "reading in" that is suggested. To say there is no conflict is not to say that there is symmetry between sections 57 and 60. However, there is no reason to believe that the Legislature intended other than what the provisions together provide. We do not read *Genaire Ltd., supra*, which dealt with substantially different facts as an invitation to ignore the clear wording of the statute. When and if the parties reach a collective agreement section 57(2) is available. Section 5(3) will apply if another trade union seeks representation rights. In the absence of either of these two situations it does not appear the legislature thought any further provision was necessary to end the relationship which was voluntarily entered into.

34. For all the above reasons, we will not make the declaration under s. 60 which the applicants request. The application is dismissed.

**CONCURRING DECISION OF BOARD MEMBER J. A. RONSON; AUGUST 31, 1990**

1. I agree with my colleagues that, as matters now stand, the applicant employees have no claim to a remedy under section 57 and section 60 of the Act.
  2. However, given the preamble to our Act, I cannot agree with my colleagues that the legislature actually intended the rather unfortunate results of this case. The employees are caught in a sort of "never never land" where their wishes are of no import. By sitting on its rights the respondent union has created a situation quite unforeseen by the legislative draftsman and clearly abrogative of the stated intention of the Act.
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**2567-88-G** Labourers' International Union of North America, Local 1036, Applicant v. **Future Care Limited** and **Kuco Construction Limited**, Respondents

**Construction Industry - Sector Determination - Whether retirement home project falling within ICI or residential sector - Matter turning on degree of direct control over unit by resident - Project falling under ICI sector**

**BEFORE:** *Inge M. Stamp*, Vice-Chair, and Board Members *W. N. Fraser* and *C. A. Ballentine*.

**APPEARANCES:** *L. A. Richmond* and *B. Suppa* for the applicant; *Mike Failes* and *P. Kuhn* for the respondents.

**DECISION OF THE BOARD; August 22, 1990**

1. This is a referral of a grievance pursuant to section 124 of the *Labour Relations Act* alleging non-compliance with the collective agreement binding on the parties.
2. In a separate section 1(4) application, the parties reached agreement and requested the Board to declare that Future Care Limited and Kuco Construction Limited constitute one employer for the purposes of the Act. Having regard to the agreement of the parties, the Board hereby declares that Future Care Limited and Kuco Construction Limited are one employer for the purposes of the Act.
3. At this stage, the parties requested a hearing before the Board to deal with the respondent's request made in response to the above grievance, for a determination under section 150 of the Act. Section 150 provides as follows:

**150.** The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers' organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e).
4. Notice was given to a number of parties who were identified as having an interest in the determination of whether the work performed on the respondent's retirement home project at 760 Great Northern Road in Sault Ste. Marie, Ontario, is work in the ICI sector of the construction industry.



5. Hearings into the section 150 determination started on June 26, 1989 and were completed on October 19, 1989. Although notice had been given to thirteen contractors and the designated bargaining agencies, no one else appeared at the hearing, other than the parties to the section 124 application, to make any submissions with respect to the section 150 issue.

6. The evidence is not in dispute. The witnesses were straightforward and credible. The project which is the subject of the section 150 determination is described as the Great Northern Retirement Home ("Great Northern") in Sault Ste. Marie. The respondent has built two other homes since being certified in 1986 by the applicant, one in Sudbury and one in Timmins. The respondent takes the position that these homes fall within the residential sector of the construction industry.

7. The retirement home was built pursuant to the residential portion of the building code. The retirement home is privately funded, with no government financing and no application for government financing. It is not subject to any legislation affecting nursing homes, homes for the aged or homes for special care. The retirement home is targeted to persons 55 years and older, but is not restricted to persons of that age. There is no ongoing medical care provided and no doctor or registered nurse on staff. There is no association with any other institution or hospital. A nursing home on the adjacent property is owned by Tendercare Nursing Homes Limited (Tendercare). Great Northern bought the land next to the nursing home from Tendercare who took back a substantial mortgage. The land is zoned for institutional use.

8. Both Tendercare and Great Northern have management contracts with Extendicare Health Services Inc. ("Extendicare"). There is no other tie-in or connection between Tendercare and the Retirement Home.

9. The Corporation of the City of Sault Ste. Marie, in granting a building permit, advised the respondent "Your working drawings for this development has [sic] been thoroughly reviewed by this office and have been examined under the requirements for Group "C", Residential Occupancy. Part 9 of the Ontario Building Code applies". The building permit issued by the City of Sault Ste. Marie describes the retirement home as an "Institutional Building" (Exhibit 4). Mr. Kuhn testified that when he queried the Building Department on that issue he was advised that "institutional" was shown on the permit because of the zoning.

10. The retirement home is a three-storey building. There are 120 suites, a number of stairwells and one elevator. There are two sizes of suites. A little over half the suites are private bed-sitting rooms and the rest are semi-private. There are two suites that can accommodate three persons. When they are not occupied by three persons, they become semi-private suites for two. There are six one-bedroom suites. There are fourteen units equipped with kitchens. If there is a demand for more units with kitchens, they can be added. Each unit has a four-piece bath.

11. Portions of the "Occupancy Agreement" (Exhibit 7) state:

1. ... In consideration of payment, by the Resident to the Owner, of the Occupancy Fee set forth in Schedule "A", the Owner shall provide to or for the benefit of the Resident, accommodation referred to herein, three (3) meals per day, maid service, laundry facilities and the right to use all recreational facilities within Great Northern Retirement Home.
2. The Resident acknowledges that this Agreement is not assignable and further acknowledges that no person other than the Resident shall be permitted to use or occupy the Suite, other than as temporary guests of the Resident.
3. The Owner, from time to time, shall establish reasonable house rules and policies

with respect to Great Northern Retirement Home, and the RESIDENT AGREES to abide by such rules and policies, including the restrictions imposed by the Owner on guests of the Resident permitted on the premises. The Resident acknowledges that the Owner may take all responsible measures to enforce compliance with such rules and policies. The current house rules are described in Schedule "B".

4. The RESIDENT FURTHER ACKNOWLEDGES that it is the owner's responsibility to furnish the suite but the Resident may be required by the Owner to occupy a suite other than the suite described in Schedule "A". PROVIDED that such suite has equivalent amenities to the suite described in Schedule "A".
5. The Resident shall pay for any services other than those referred in paragraph four(4) above, when billed by the Owner. Any arrears of payments of the Occupancy Fee and any incidental charges for such additional services not paid within thirty(30) days after the Owner renders an account therefor, to the Resident, shall be subject to a delinquency charge of 1-1/2% per month until paid.
6. The Resident further acknowledges that since the Great Northern Retirement Home is not equipped to provide and is not providing nursing or medical care, that, in the event the Resident shall require special nursing or medical care as a result of physical or mental incapacity, the Owner shall be entitled to terminate this Agreement.

12. Residents can decorate suites, at their own expense, if they wish. If the retirement home provides the furniture, the rate is higher. Residents are encouraged to bring their own furniture.

13. All suites have their own thermostats and there is provision for an air-condition unit. All suites are equipped with 3 pull-cords, one in the bathroom and two in the bed-sitting area. The pull-cords notify the person at reception that there is a problem. It is intended for emergencies, i.e., a fall in the bath-tub or out of bed. Laundry services are available and there are coin-operated washers and driers on each floor for persons wishing to do their own laundry.

14. The basic per diem includes three meals per day and open snack-bar. There are common facilities, including main dining lounge, private dining lounge, two activity rooms, two exercise rooms, chapel, library, designated smoking rooms, three lounges, three private laundry rooms, a small shop for selling products such as toothpaste and other personal needs, and a beauty salon which is open to the public. There are parking facilities for the residents. Furnished guest suites are available for visitors for a fee. There are Registered Nursing Assistants (RNA's) but they are not allowed to work under their licence without a Registered Nurse (RN) being present. The RNA's are floaters and participate in all activities. If residents require medical or nursing care, they have to leave. If they are ill and requiring hospitalization, their suite is kept for them until they return. All residents must be able to look after themselves. There is no personal care assistance available, no dispensing of medication, no meal tray service to the rooms. There is no infirmary on the premises. There is a room on the first floor for the RNA's, with a counter, sink and coffee machine.

15. In December of 1988 Kuco Developments signed both a pre-operational agreement and a management agreement for a health care facility with Extendicare. Extendicare provides marketing services, managerial and bookkeeping services, is responsible for the budget, operation of the building and administration of the residents. Extendicare provides the administrator (Exhibits 8 & 9).

16. By building the structure under the Group "C", Part 9 of the building code which also applies to individual homes, as permitted by the city, all the wiring is done under the residential code allowing for standard house wiring, using conduit only from the main feeders. There is no

requirement for a sprinkler system. A standard wood truss is used in the construction of this structure. The retirement home consists of cast concrete on the first floor and 2' X 6' wood frame for the rest. The second and third floors are clad in steel siding. By contrast, the nursing home nearby is constructed of non-combustible materials, solid masonry, open steel web joists, steel joists and Q-decking (steel).

17. The respondent testified that in the Fall of 1987 similar projects were built in Sudbury and Timmins in the residential sector and that the union was aware of these projects.

18. Part of Extendicare's standard management agreement includes the option to purchase and the first right of refusal. The respondent's evidence was that without the Extendicare management agreement it would not have been able to obtain the mortgage to build the facility since the respondent has no experience operating retirement homes.

19. The respondent explained the concept involved in building retirement homes in close proximity to nursing homes. It is a community for the elderly, those that need care and those that do not. The persons in good health start out in the retirement home and when they need assistance they go to the nursing home. In the case of couples, if one needs to go to the next stage, the other is still close by. The respondent's position is that they are "selling a lifestyle, not health care".

20. The floor plans in Exhibit 24 included nurses' rooms which were subsequently deleted by the respondent. Although an examination room is part of the floor plan, the respondent explained that the final plan did not include such a room. There were a number of other changes in the plan at the time of actual construction.

21. Some of the features in the promotional literature (Exhibit 6) include:

- Enjoy safe, carefree living.
- Gather in the recreation room for crafts and cards.
- Relax in the whirlpool.
- Hop into our private van for a day of shopping or other outings.
- Use the exercise room to stay fit and active.
- Join friends for a game of cards or a chat.
- Spend quiet moments in our chapel.
- No more cooking or cleaning.
- No more health worries because a nurse is on call at all times.

The brochure goes on to talk about all the comforts of home - with none of the work:

All meals at Great Northern are prepared by our professional chef and served at your table. Savour our gourmet cooking in the main diningroom... or in our private dining room with your family or friends. Are you accustomed to midnight snacks? Help yourself to the dining room refrigerator anytime - 24 hours a day.

Dedicated, trained staff clean your apartment everyday and launder your towels and linen. They will also do your other laundry. The Activities Co-ordinator plans outings, games and other entertainment. There is a beauty salon right in the home.

22. Residents are able to lock their doors. There will be a staff person with a master key on a 24-hour basis. Currently the kitchen staff and dining room staff are estimated at 8 persons; housekeeping and laundry room staff at full occupancy is about 7. It is anticipated there will be 2 receptionists, 4 RNA's, as well as administrative staff, including an administrator and an assistant administrator. Staff will include a part-time maintenance person and an activity co-ordinator to arrange outings, set up trips and drive the courtesy van. Full-time staff will be between 20-25. The maximum number of residents is 174. The home includes 2 in ground jacuzzies which can be



reserved ahead of time. There is a storeroom for the RNA on duty, where blood pressure equipment and emergency nursing supplies are kept.

23. With respect to the shared suites or semi-private rooms, Extendicare would try to find persons that are compatible. Residents can share with friends if they wish. If one person moves out, the other can pay the difference or another person will move in. However, the Home will have the final say.

24. A receptionist is on duty from 8:00 a.m. - 8:00 p.m. Visitors can be buzzed in from the rooms/apartments. Pets are allowed in the retirement home, provided they do not cause problems.

25. The respondent testified that he understood all services were flexible and the rate would be adjusted accordingly. The marketing manager of Great Northern testified that the only optional service is the meal service. Linen and housekeeping are part of the daily rate and are not negotiable. We accept the marketing manager's evidence as being more accurate in terms of what services are optional.

26. A referral service operated by the Victoria Order of Nurses and funded by the Ministry of Health lists the Great Northern. The marketing manager was not aware that Great Northern was listed by the referral service, although there had been discussions about referring potential clients. The referral service lists Great Northern under Type 1, Residential.

27. The owner/operator of the retirement home reserves the right to remove anyone who becomes ill for an extended period of time and place them in a hospital or nursing home. In the respondent's view, it is not a care facility but offers services and assistance in emergency situations only.

28. There was evidence as to why leases were not desirable for this type of facility. The *Landlord and Tenant Act* would not provide the flexibility needed for persons moving from a Type I facility to a Type II or III facility.

29. Type I, II, III facilities (Exhibit 28) are generally described as follows:

#### RESIDENTIAL - TYPE I CARE

The person requiring Type I care, should be independently mobile either alone or with the use of a cane, walker or wheelchair. The person may have a chronic or ongoing medical condition but it is stabilized either by medication or by other measures. The person requiring this care is probably able to perform most of the daily grooming tasks, such as washing, dressing, shaving, etc. but due to physical or mental frailty, may require someone to monitor or supervise or provide minimal assistance to ensure that these tasks are done. The individual should be independent for toileting needs, requiring only a gentle reminder or perhaps to have someone point out the location of the washroom as necessary. The type of care provided in this setting is primarily supervisory: treatments, if any, are standardized and include maintenance, medication and preventive care.

...

#### EXTENDED HEALTH - TYPE II CARE

The person requiring Type II Care, requires on-going Nursing Care over a 24 hour period. This individual may have a Chronic Medical condition, but is stabilized by either drugs or standardized therapeutic measures, and requires minimal intervention. The individual requires, either as a result of physical or mental impairment, a minimum of 1 1/2 hours of skilled nursing care daily. This care may include daily washing/bathing, some, or total assistance with dressing, regular toileting, or prompt attendance for incontinence, regular care for skin, teeth, hair and nails.

supervision, or in some instances feeding, of meals. The care needs may include limited physiotherapy of exercises. The focus of care in the Extended Health program is reactivation oriented maintenance on a 24 hour basis over a prolonged period of time.

...

#### CHRONIC CARE PROGRAM [Type III]

Care in a hospital can be either an acute short-term illness or for a long-term chronic illness or disorder. When a person requires care as an inpatient for a chronic disorder for a long period of time, and this care includes the need for regular frequent care by skilled professionals, then this care is provided in hospital in a chronic care bed.

Under this program, after 60 days the patient contributes toward the cost of his/her room and board. The cost of health care is paid by the Ontario government. The patient's contribution (the co-payment) for room and board is adjusted on a quarterly basis. However, there are few exemptions to the requirement for co-payment.

30. The Board heard evidence with respect to a non-profit senior citizen home run by the Ontario Finnish Rest Home Association. The facility included self-contained senior citizen apartments and a residential care home. The facility is not subject to the *Nursing Homes Act* or the *Home for the Aged Act*. There is some assistance for residents such as getting in and out of the bathtub on a weekly basis. There is help from family members and volunteers. Some of the other services are similar to those of Great Northern, i.e. meals, linen service, housekeeping. Fees are paid on a monthly basis. There is an age requirement of 59-60 and income restrictions in order to be eligible.

31. Wm. Suppa testified on behalf of the Labourers. He testified as to how he obtained Exhibits 23, 28, 29 and 31. Exhibit 28 was handed out by the placement service detailing the different types of care, Residential - Type I Care, Extended Health or Type II Care and Chronic or Type III Care. The document is not dated nor does it indicate the author of these definitions. The work performed in connection with the Phase I of the Finnish Home was performed under an agreement (Exhibit 33) which is an all sector agreement. Phase II was built by Tuomi Bros. (Exhibit 37).

32. Exhibit 29 includes a question and answer leaflet explaining the services and accommodation at Great Northern. Some of these questions and answers are set out below:

Q. What is a retirement residence?

A. A retirement residence is for people who are able and desire to care for themselves, and who wish to be free from the traditional responsibilities of maintaining a private home. The residence provides a social, yet private lifestyle for active, independent seniors, some who may require minimal care and assistance. Great Northern Retirement Home has been designed to offer a variety of features to meet your every need.

Q. What does the monthly rate include?

A. Your monthly rate includes weekly laundry service, including linen as well as daily housekeeping. Full-time nursing assistance is on duty for individual help as required. Our formal dining room provides you with three(3) meals a day and 24-hour access to a snack refrigerator in the dining room hall. Private telephone and cablevision can be installed and maintained at an additional cost.

- Q. How private is my accommodation?
- A. As private as your own home. No one will enter without your permission. Privacy is respected by the staff who are available to assist you at all times.
- Q. May I prepare some of my own meals?
- A. Our modified meal plan allows you to set your own schedule for meals, while enjoying your main meal in the dining room at either lunch or dinner. Your monthly rate will be reduced. The kitchenettes provided in the suites will provide a minimal service at meal time.

33. Mr. Suppa testified that the work characteristics involved in building Great Northern and a small shopping plaza are the same. The skills required are the same.

#### Argument

34. Respondent's counsel referred the Board to a number of cases. *Heavy Construction Association of Toronto*, [1973] OLRB Rep. May 245 looks at the end use and the work characteristics to define the sector. *Ecodyne Limited*, [1979] OLRB Rep. July 629 was cited by the respondent for the proposition that you cannot look at work characteristics in isolation. The intended use has to be considered as well.

35. The respondent referred to the Board's jurisprudence in *West York Construction*, [1983] OLRB Rep. Dec. 2132; *Sword Contracting*, [1985] OLRB Rep. May 743; *Armbro Materials*, [1987] OLRB Rep. July 948 and *Dufferin Construction*, [1989] OLRB Rep. Jan. 25 with respect to the criteria used when making sector determinations. Counsel submits that there are two principles coming out of *Sword Contracting*, *supra* and *West York*, *supra*:

- 1) the Board should look at the use in the beginning of its analysis;
- 2) work practice can be used to differentiate projects which are similar in their end use but have some uncertainty as to which sector they fall into.

Counsel submits to a large extent, end use and work practice are going to be interrelated. (*West York*, *supra*).

36. Counsel for the respondent submits that the building in question, Great Northern, is clearly a place people live; it is their home. They will live there on the average 5-10 years. The case before us is different from that of *Sword Contracting*, *supra*. There is no medical care involved in Great Northern. There are three care levels - I, II and III or chronic care. Persons who live in this retirement home are not subject to any of those levels of care. The advantage here is a carefree lifestyle. If more kitchen facilities are desired, they can be added. The contrast between the Finnish Rest Home, which falls within *Sword Contracting*, and that of Great Northern, is that unlike Great Northern, the Finnish Home is non-profit and received funding from Comsoc. The Finnish Rest Home is run by an organization which has a social benefit objective. This particular group is limited by age and income with a Board of Directors elected by that non-profit organization. That definition, counsel submits, flows from the *Sword Contracting* case. There should be no doubt that Great Northern does not fall within *Sword Contracting*. But if there is some doubt, in this case work characteristics differentiate it - such things as the importance of the design characteristics, the materials used, the trades involved and the kinds of problems one would find in the workplace. The design is essentially frame construction covered by Part C of the Residential Building Code,



Part 9 of which is applicable to residential construction. Counsel referred the Board to the definitions of "institutional" and "residential" used in the Building Code and which read as follows:

**Institutional occupancy** means the occupancy or use of a **building** or part thereof by persons who are involuntarily detained, or detained for penal or correctional purposes, or whose liberty is restricted, or require special care or treatment because of age, mental or physical limitations.

**Residential occupancy** means the occupancy or use of a **building** or part thereof by persons for whom sleeping accommodation is provided but who are not harboured or detained to receive medical care or treatment or are not involuntarily detained.

37. Counsel submits that these definitions are important in dealing with construction regulations for the province of Ontario and determining the requirements for the building. Clearly this building falls within "residential" as defined under the Building Code. If the building was "institutional" it would have to be built from non-combustible material, i.e., concrete or brick, not wood-frame. If it was a hotel, it would have to be built of non-combustible material. Under the *Nursing Home Act*, the building has to be designed a certain way; materials to be used are specified. This is an important design characteristic which distinguishes it from Great Northern. Similarly, there are differences in design to accommodate the *Hotel Fire and Safety Act*. Counsel for the respondent contends these differences will affect the tradesmen used. Instead of carpenters, there will be other trades doing brickwork and poured concrete work (see paragraph 7 of *West York Construction, supra*). There are different trades involved, depending on the materials used. The work problems one will encounter depend on who will be doing the work. The building code regulations do not require non-combustible materials or other design criteria. In addition, counsel for the respondent referred the Board to *West York Construction Ltd.* (Board File No. 1938-86-JD) where another local of the applicant took the position that this type of construction is in the residential sector in Toronto.

38. In summary, the respondent submits that the building in question clearly does not fall within the institutional sector as defined in *Sword Contracting, supra*. It is of a different nature; there are different characteristics which are not found in *Sword Contracting* because of the nursing component. That is not the case here. It is important for the Board to be consistent across the province. The respondent has not had problems in other parts of the province, only in Sault Ste. Marie.

39. Counsel for the applicant submits that this case is unlike *Sword Contracting, supra*, and *West York Construction, supra*. In the instant case, only the Labourers have a collective agreement with the respondent. If this project is in the ICI sector, then the agreement applies. This is not a matter just between these two parties. If the project is in the ICI sector, then section 146 of the *Labour Relations Act* has been breached in that another arrangement has been made. The applicant submits that this project is in the ICI sector and relies on both the commercial and institutional portions. One can have a building that is commercial and institutional; for example, a privately-owned hospital run for profit.

40. Counsel argues Great Northern is a commercial institution designed to make a profit for its owners by housing a certain target group of the elderly in respect of which a market has been identified. It is a combination of commercial and institutional, with a large residential component. Whether the facility is built by a charitable organization or private enterprise cannot affect the end use or the work characteristics.

41. Tendercare, the nursing home, sold their adjacent lot to Great Northern and took back the mortgage. Extendicare operates both the nursing home (Tendercare) and the retirement home (Great Northern). Extendicare is a large corporation and has a sophisticated management con-

tract. Counsel submits they are managing an institutional facility, not an apartment building. Tencare and Great Northern both have an interest in the concept of having a community for the elderly with different levels of care. Counsel pointed out the reference to "commercial cooking equipment" in Exhibit 3 under Building Code Requirements. Counsel submits that apartments or houses do not need equipment to feed 150 people three times per day. There is a residential aspect in that people live in the home. But this is no different, counsel submits, than people living in hotels, motels, student residences and even jails.

42. Applicant counsel refers to Exhibit 9, where Extencare describes the Great Northern nursing home as a health care facility, not apartments or apartment suites. Extencare are not property managers. They are health care facility administrators. Extencare is marketing this facility as a retirement care facility, a health care facility. Counsel contends that these are not the type of agreements entered into for residential properties where you need someone to perform maintenance work and rent the apartments.

43. Counsel for the applicant submits this facility is for the elderly who are healthy and wealthy. This is not a home for a person living on a Canadian pension. \$1,050.00/month for one person to share an apartment, with meals, is not inexpensive. Approximately half of the suites are shared accommodation, the other half are private. Only a small number of suites have cooking facilities. Approximately 150 of the 170 residents will be eating in the dining room. A staff of approximately 27 will be looking after the Home, including kitchen staff, housekeeping staff, receptionists, RNA's, a driver, part-time maintenance person, a manager and an activity co-ordinator. Counsel submits you would not have housekeeping staff, RNA's and kitchen staff in a condominium or apartment building. That type of staff complement is found in an institutional/commercial building.

44. Counsel submits the facilities and services offered by Great Northern as outlined in Exhibit 6 are of a nature that make this an institutional/commercial building. Some of these services might be available in some luxury condominiums. What distinguishes this facility from a senior citizen's residence is the medical care in the form of RNA's, the food services and the cleaning services - all the comforts of home with none of the work. Meals are prepared and served.

45. Counsel for the applicant contends that residents give up certain residential rights of a private home, such as when and what to eat, who to share a room with, or to stay as long as you want. When the manager retains that kind of control it ceases to be an apartment building. It is the degree of control, counsel argues, in the areas of daily living that caused the Board in *Sword Contracting, supra*, to find that the Baker Centre was within the ICI sector.

46. Counsel contends the building code does not tell the Board what ICI construction is. All it says is how buildings of that size can be built, including small hotels or motels of the same size. There are no differences in the skills or work characteristics between the Great Northern or a shopping mall of the same size. There are no differences in the work characteristics. Concrete forming is the same for this building or a small shopping mall.

47. There is not a lot of past practice in this area. The Finnish Rest Home was built under the ICI agreement. Counsel argues that because the respondent got away with building other facilities non-ICI it does not mean that the Labourers have agreed that this facility is not in the ICI sector. There was no contact with Local 1036 of the Labourers as to how this home was going to be built. The applicant in this case is not interested in what happened in other areas. Counsel submits that this applicant raised the issue early. Any resulting damages are not because of the applicant's failure to advise the employer of its position.

48. Ultimately, counsel submits that it is the degree of autonomy versus the degree of control over the persons who are going to reside in these institutions or facilities that should determine how they are viewed. The applicant contends that the work involved in building the Great Northern is work within the ICI sector. If the work is found to be ICI work, counsel requests that the Board remain seized with respect to damages in the section 124 should the parties be unable to come to an agreement.

### Decision

49. The Board has been asked to determine whether the Great Northern comes within the residential or the ICI sector of the construction industry. Section 117(e) reads:

117.-(e) "sector" means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermain sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector.

50. The construction of a single family home is clearly in the residential sector. The construction of a hospital is clearly in the ICI sector at the other end of the spectrum. The question then is at what point in the spectrum does a facility such as the Great Northern cross over from a residential building to a commercial/institutional building? There is not a lot of area practice in Sault Ste. Marie with respect to retirement homes. The building code requirement is not determinative of the sector for the purposes of the *Labour Relations Act*. Commercial type buildings can also be built under the residential code. Group C (Exhibit 19) of the Building Code includes hotels and motels. The fact that the Great Northern is in close proximity to a nursing home or that they retained the same administrator is not determinative in the circumstances of this case. There is no difference in the work characteristics in the work performed by members of the applicant on a retirement home such as Great Northern or a small commercial project.

51. The promotional literature for Great Northern describes features and services which show this is more than a home in the traditional sense. Some of the services included in the fee are the type of services one would find for example in a hotel as opposed to an apartment building or a condominium.

52. It is, in the final analysis in the circumstances of this case, a matter of the degree of direct control over one's "home". In the Great Northern, the residents have very little personal control. The occupancy agreement shows the degree of control exercised by the administrator/owner. This arrangement is substantially different than that between a landlord and a tenant. Approximately half of the units are "shared" accommodation. When a "resident" requires on-going medical care he/she has to leave. The administrator has the final say in the choice of a room-mate. As in *Sword Contracting, supra*, there are shared areas not under the residents' direct control. In *Sword Contracting, supra*, the Board held as follows:

36. ... However, while the fact people reside in a facility is one factor that suggests that the construction of the facility comes within the residential sector, it is not by itself necessarily determinative. People reside in a number of facilities that do not come within the generally understood meaning of the term residence. For example, servicemen may reside in army barracks and convicted criminals reside in correctional facilities, and yet it is questionable whether the construction of either of these types of facilities involves work coming within the residential sector of the construction industry.

37. In assessing what type of construction does come within the residential sector, the logical place to start is with the construction of a single family home to be owned by the family that will be residing in it. Such construction clearly comes within the residential sector. When one moves



away from this clear-cut example, however, the matter becomes more complex. For example, it might be argued that the construction of a rental apartment building should be viewed as commercial construction because the owner intends to operate the facility to make a profit. On the other hand, however, once an apartment unit is rented out it becomes someone's home in the generally accepted use of that term. The residents carry out their activities of daily living in a physical area they have a tenancy interest in, and immediate control over. There has grown up a clear and generally accepted practice in the Toronto area of treating the construction of apartment buildings as coming within the residential and not the ICI sector of the construction industry. Based on this practice, the Board has in the Toronto area recognized such construction as coming within the residential sector. Indeed in the *West York* case, on the basis of a generally accepted local practice, the Board concluded that a building built by an institution but comprised primarily of self-contained apartment units also came within the residential sector. The Baker Centre is, however, even further removed from the example of the single family home. Although accommodation will be provided at the Centre, it will not be in self-contained units. Rather, individuals will be required to conduct a major part of their activities of daily living, including eating and bathing, in shared areas not under their direct control. No matter how concerned staff might be about giving residents as much autonomy as possible, it seems reasonable to assume that residents will have to conform to certain rules and norms relating to matters such as meal times. In the nursing home portion of the Centre, residents will be receiving daily nursing care under the direction of a professional nursing staff. Staff working in both the retirement and nursing home portions of the Centre will not be under the immediate direction of the residents, as would be the case of domestics employed in a home, but rather under the direction of a company hired for the express purpose of managing the Centre.

38. In the health care field the word institution has developed a negative connotation, primarily because it connotes a medical model of care where an individual loses more autonomy over his daily living activities than is necessary. However, outside the health care field, the word institution has a much more neutral connotation. The term is generally used to refer to an organization established to provide a service viewed as being of benefit to either the public at large, or to some specific group. For example, schools, universities and churches are generally viewed as institutions. In this sense of the word, we also view the Baker Centre as an institution. It is a non-profit organization formed in part for the socially beneficial purpose of providing facilities for the elderly who are unable or unwilling to live independently. Through an outside management firm and a fairly large staff of employees, the Centre will be providing nursing care and other forms of assistance to its elderly residents. The Centre will also house day care facilities for children and elderly persons. The Baker Centre is held out to the public as being associated through the Northwestern Health Centre with the Northwestern General Hospital. The bylaws of the Baker Centre require that a majority of the directors of the Centre, including the chairman, either be connected with the Northwestern General Hospital or be approved by the board of directors of the Hospital. Given all of these factors, we are satisfied that the construction of the Baker Centre does come within the industrial, commercial and institutional sector of the construction industry as that term is used in the *Labour Relations Act*.

53. With respect to the position taken by another local of the applicant in another proceeding that this work is residential and the possibility for inconsistent results across the province, the Board in paragraph 25 and 26 of *West York, supra*, made the following comments:

25. Lacking a definition of either the residential or the ICI sector in the Act, the Board is required to determine the dividing line between them with limited statutory guidance. In determining the matter, we incline to the view that as far as reasonably possible our conclusion should be one which takes into account existing industrial relations realities. We would refer in this regard to our earlier expressed view that by incorporating the notion of sectors into the Act, the Legislature did not thereby intend to change the existing understandings between trade unions and employers as to the scope of the different sectors. We recognize that local practices and understandings might vary in different parts of the Province and that our approach has at least the potential for different results in different areas. We also recognize that this might create a number of uncertainties. Nevertheless, we view such a situation as something that both trade unions and employers can accommodate themselves to. Indeed, if the result of this approach is that the line separating the residential and ICI sectors is some-what different in vari-

ous parts of the Province, it would be precisely because trade unions and employers in different parts of the province have already adopted different approaches to the issue.

26. This is not to say that local area practices or local agreements will always be determinative. Most projects clearly fall within one sector or another, and a local practice or agreement cannot alter that fact. Accordingly, an agreement to regard a clearly ICI project such as a shopping plaza or a school as residential would not find much favour with the Board. Rather, it is only with respect to those relatively small number of projects which fall into the "grey area" between the sectors that a widely accepted local practice or agreement might assist in deciding how the project should be characterized. We would caution, however, it is possible that for one reason or another other relevant factors might be persuasive enough to cause the Board to conclude that a local practice or agreement should not be followed. Each situation will have to be determined on the facts involved.

54. Having regard to the entirety of the evidence and the cases cited, we find that the construction of the Great Northern Retirement Home in Sault Ste. Marie falls within the ICI sector of the construction industry.

55. The Board will remain seized with respect to the section 124 grievance should the parties be unable to agree on the amount of damages.

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**1367-89-R United Brotherhood of Carpenters and Joiners of America, Local 494, Applicant v. Kent Acoustics Limited, City Acoustics Limited, J.L. Acoustics Ltd., Respondents**

**Construction Industry - Related Employer - Individual owning and operating small acoustic and drywall company in commercial and residential sectors in southwestern Ontario until company dissolution 1981 - Same individual buying into and operating similar drywall company in same area from 1987 onward - Individual was "key man" in expertise and experience in each case - Six year gap no compelling reason for Board to decline related employer declaration - Declaration issuing**

**BEFORE:** *Ken Petryshen*, Vice-Chair, and Board Members *G. O. Shamanski* and *P. V. Grasso*.

**APPEARANCES:** *David McKee* and *Jim Caron* for the applicant; *Arthur Barat* for J. L. Acoustics Ltd.

**DECISION OF THE BOARD;** August 13, 1990

1. These are applications in which the United Brotherhood of Carpenters and Joiners of America, Local 494 ("Local 494") seeks declarations and other relief under sections 1(4) and 63 of the *Labour Relations Act* against Kent Acoustics Limited ("Kent"), City Acoustics Limited and J.L. Acoustics Ltd. ("J.L.").

2. During the course of the hearing, Local 494 advised the Board that it was no longer seeking relief against City Acoustics Limited. Accordingly, these applications insofar as they relate to City Acoustics Limited are dismissed. Local 494 also advised the Board during the course of the hearing that it was no longer requesting relief under section 63 of the Act. Accordingly, these applications are dismissed to the extent they rely on section 63 of the Act.

3. The issue the Board is left with is whether Local 494 is entitled to relief under section 1(4) of the Act against Kent and J.L. Rene Alarie, the president of J.L., gave evidence as did James Caron, the business representative for Local 494. In determining the facts, the Board has carefully reviewed the evidence and the parties' submissions relating thereto.

4. Kent operated as an acoustic and drywall contractor from a location in Chatham, Ontario until 1981. Rene Alarie started working for Kent as an installer in approximately 1976, and in 1977 he purchased all of the shares of Kent from R. Flamminio and became the president of Kent. Alarie held the shares personally until 1978 when they were transferred to R.B.A. Holdings Limited, a corporation controlled by Alarie and his wife. In essence, Alarie was the owner of Kent between 1977 and 1981. During this period Kent was basically performing work in the residential and commercial sectors. Most of the commercial work Kent did was in Chatham while the work performed by Kent in Windsor was essentially residential. Kent also performed some work in the Sarnia area.

5. Given that Kent was a relatively small contractor, it is not surprising that Alarie had complete control of the business. He was responsible for obtaining work for the company and he hired the persons employed by Kent. Kent employed anywhere from 10 to 15 installers who were paid on an hourly basis. Most of the individuals who worked for Kent, however, did so on a sub-contract basis, which is apparently common in this industry, particularly in the residential sector. Kent was bound to the Carpenters' Provincial Agreement and to a residential collective agreement with Local 494 covering certain work performed in the residential sector in the Windsor area.

6. Given the condition of the economy in 1981, Kent experienced a drop in volume and had accumulated approximately \$300,000 in bad debts from general contractors. Alarie closed Kent down in 1981. The equipment owned by Kent, which was not extensive given the nature of the business, was sold to different persons and the proceeds were used to pay off debts. In 1985, Kent's Certificate of Incorporation was cancelled and the corporation was dissolved for default in complying with the *Corporations Tax Act*.

7. In 1981, Alarie moved to Alberta and until 1984 he was employed as a general superintendent for a construction company. Between 1984 and 1987, Alarie owned and operated a tavern outside of Winnipeg, Manitoba. In late 1986, Norman Lachance, a drywall installer who had worked for Kent as a subcontractor, contacted Alarie in Winnipeg and asked him if he wanted to purchase a part of J. Lopes Acoustics Ltd. ("Lopes"). Lopes was an acoustic and drywall contractor formed in 1985 and located in Sarnia, Ontario. Lachance worked in the field for Lopes and J. Lopes did the estimating and the paper work. When J. Lopes considered quitting, Lachance contacted Alarie to see if he was interested in taking over from J. Lopes. After further discussions, Alarie purchased the share from J. Lopes in January 1987. In April 1987, Alarie moved to Sarnia and took over the operation of Lopes. In February 1988, Alarie changed the name of J. Lopes Acoustics Ltd. to J.L. Acoustics Ltd. and in February 1989 he purchased the other share from Lachance to become the sole owner of J.L. J.L. closed its Sarnia office in June 1989 and moved to Windsor. For ease of reference, the remainder of this decision will not distinguish between Lopes and J.L. and will simply refer to Alarie's business as J.L.

8. Prior to Alarie's involvement, J.L. did not have a lot of work per year in dollar value. In January 1987, J.L. had a few contracts and Alarie agreed in cross-examination that these contracts were of little value without someone of his experience running the business. Alarie also acknowledged that there was some advantage to purchasing a share in J.L. rather than starting a new company since J.L. had a charter and the red tape associated with establishing a company had already been completed. When Alarie arrived in Sarnia in April 1987 he ran J.L. He attempted to



obtain work and he did the estimating and the work in the office. He also hired the persons working for the company and he dealt with customers. Lachance continued to simply work in the field.

9. J.L. obtains its work from general contractors and works in the Sarnia, Windsor and to some extent, in the Chatham areas. Prior to moving to Windsor, J.L.'s work was essentially evenly split between Windsor and Sarnia. J.L. performs work in both the residential and commercial areas, with the majority in the residential category. At least 80% of the work it does in the Windsor area is residential. Between 1987 and 1989, J.L. has had six commercial jobs in the Windsor area. Since J.L. does not employ any hourly-paid employees, its work is performed by subcontractors. J.L. owns two cars, four trucks, power and bench saws and Hilty guns. The subcontractors provide the majority of their own hand tools.

10. The essence of Local 494's position is that Alarie is the key element in the business activities of Kent and J.L. Local 494 argues that it is Alarie's expertise and experience in the acoustic and drywall areas which gave life to Kent and gives life to J.L. Local 494 maintains that the preconditions to granting section 1(4) relief are present in this case and that the circumstances warrant the exercise of the Board's discretion in its favour. Alarie operated a business in Local 494's area between 1978 and 1981 and Local 494 has recently discovered that Alarie is operating essentially the same business in its area. Local 494 submits that these circumstances should cause the Board to grant it the relief it seeks. Counsel for J.L. argues that the facts should lead the Board to dismiss this application.

11. Section 1(4) of the *Labour Relations Act* provides as follows:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

12. The following comments of the Board in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 are worth reiterating:

12. ...Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 [now 63] which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another. Section 55 [now 63] has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase "whether or not simultaneously". The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity

is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a "transfer of a business" which might trigger the application of section 55 [now 63]. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union's bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section 55 [now 63] into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. However, it should be noted that section 1(4) is discretionary. The Board need not make a 1(4) declaration even when the conditions precedent are present; and has not done so, for example, where a trade union is seeking to *extend* rather than *preserve* its bargaining rights.

13. On the facts before us, the Board is satisfied that the three conditions precedent to granting section 1(4) relief have been met. Kent and J.L. are engaged in related activities and are under common control and direction. Kent was and J.L. is an acoustic drywall contractor performing work in the commercial and residential sectors of the construction industry. The kind of work performed by Kent is essentially identical to the work performed by J.L. From 1978 to 1981, Alarie owned and was in complete control of the operations of Kent. From April of 1987, Alarie owned 50% of J.L. and in February 1989 he became the sole owner of J.L. The evidence discloses that even when he owned 50% of J.L., Alarie was in control of the business, with Lachance essentially content to simply work in the field as an installer. These aspects of the evidence clearly indicate that Kent and J.L. are engaged in related activities under the common control and direction of Alarie. The more difficult issue is whether this is an appropriate case for the Board to exercise its discretion in favour of granting Local 494 the relief it seeks.

14. In *Ian Somerville Construction Ltd.*, [1988] OLRB Rep. Oct. 1022, the Board was confronted with a similar issue given a 5½ year gap between two businesses that were related and under common control and direction. In that case, the key principal of both companies did not buy an existing business but simply started another business 5½ years after ceasing the first business. The Board's comments concerning the exercise of its discretion are as follows:

19. The economic activity of ISCL that gave rise to a collective bargaining relationship with Local 27 is, in effect, now carried on by 671860. The two entities are engaged in related activities under common control and direction. We are unable to discover any labour relations reason in these circumstances for concluding that the bargaining rights of Local 27 should not attach to the "definable commercial activity" simply because that activity is carried on through another legal entity 5½ years after ISCL ceased operating. If Robert Somerville revived ISCL in 1987 to carry on the work now performed by 671860, there would be no question that the bargaining rights of Local 27 would continue. The fact that Robert Somerville elected not to revive ISCL but rather to utilize another corporate vehicle to carry on a related business 5½ years later is not a compelling reason to decline to exercise our discretion in Local 27's favour. After review-

ing all of the circumstances, including the 5½ year gap, we find that this is an appropriate case to exercise our discretion in favour of granting Local 27 the relief it seeks.

15. On behalf of Local 494 it is argued that no material distinction exists between the facts in this case and those in *Ian Somerville Construction Ltd.*, *supra*. In the Board's view, this assertion is essentially correct. When Alarie bought his share in 1987, J.L. had very little business. As Alarie noted in his evidence, J. Lopes was planning on quitting the company and would not have had any interest at that time in securing additional business. In any event, it appears as if Lopes' operation never did have much of a volume. Alarie agreed with the suggestion that buying into J.L. was useful since one could avoid the "red tape" involved in setting up a new company. He also agreed with the suggestion that whatever contracts J.L. had at the time he purchased his share had little value without his expertise and business experience. We do not have in this case a situation where Alarie purchases an established business of significant size which he operates. Rather, the evidence discloses that Alarie is merely buying a shell of a business with certain assets that have very little value without his involvement. In reality, the circumstances here are not unlike a situation where Alarie creates a new company to carry on a related business.

16. As one might expect with a small contractor, J.L.'s success will be determined not by what Alarie inherited from Lopes but by what he will contribute to the business. Given his virtually complete control of the business, its future depends on his ability to estimate jobs, hire competent personnel and his dealings with general contractors.

17. Local 494 had bargaining rights for an acoustic and drywall business operated by Alarie in southwestern Ontario until 1981. It has recently discovered that Alarie is again operating an acoustic and drywall business in southwestern Ontario by means of a different legal entity. The Board is satisfied that in the circumstances of this case, Local 494 is not attempting to extend its bargaining rights by means of a section 1(4) application but is attempting to preserve bargaining rights which it has for Kent. The Board finds that this is an appropriate case to exercise its discretion in favour of granting Local 494 the relief it seeks.

18. Accordingly, the Board hereby declares that Kent Acoustics Ltd. and J.L. Acoustics Ltd. constitute one employer for the purposes of the *Labour Relations Act*. The Board also declares that J.L. Acoustics Ltd. is bound to the Carpenters Provincial Agreement and to the collective agreement which Local 494 has covering residential work within the City of Windsor and the Counties of Essex and Kent. In accordance with the position of Local 494 taken during argument, these declarations are effective from the date of this decision.

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**2653-89-R; 2808-89-U** Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Lume Masonry Ltd.**, Respondent v. Group of Employees, Objectors; Labourers' International Union of North America, Ontario Provincial District Council, Complainant v. Lume Construction Limited and/or Lume Masonry Limited, Respondent

**Evidence - Practice and Procedure - Privilege - Settlement - Witness - Employer alleging it agreed to a settlement because it mistakenly believed the union would provide certain assurances - Assurances not incorporated into settlement document - Employer seeking to adduce evidence of settlement discussions with Board officer and union - Board denying consent to hear such evidence as to do so would undermine the settlement process and the impartiality of Board officers**

**BEFORE:** *Robert D. Howe*, Vice-Chair, and Board Members *W. H. Wightman* and *H. Peacock*.

**APPEARANCES:** *Mark Zigler, Ron Davis, John Moszynski* and *Keith Rimmington* for the applicant; *Mark Geiger* and *Luigi Mesina* for the respondent; no one appeared for the objectors.

**DECISION OF THE BOARD;** August 1, 1990

1. File No. 2653-89-R is an application for certification which was filed by the applicant (also referred to in this decision as the "Union") on January 31, 1990. File No. 2808-88-U is a complaint under section 89 of the *Labour Relations Act* in which the Union alleged that it had been dealt with by the respondent (also referred to in this decision as the "Company") contrary to sections 64, 66, and 70 of the Act. The allegations in that complaint also formed the basis for the Union's alternative request for certification under section 8 of the Act.

2. In a decision dated April 9, 1990, another panel of the Board wrote as follows concerning these matters:

1. The name of the respondent in Board File No. 2653-89-R is amended to read: "Lume Masonry Ltd."

2. Board File 2653-89-R is an application for certification. Board File 2808-89-U is a complaint pursuant to section 89 of *Labour Relations Act* alleging contravention of section 64, 66 and 70.

3. The Board finds that Locals 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089 of the Labourers' International Union of North America, Ontario Provincial District Council are trade unions within the meaning of section 1(1)(p) of the *Labour Relations Act*. The Board further finds that they are constituent trade unions of the applicant.

4. The Board further finds that the applicant is a council of trade unions within the meaning of section 1(1)(g) of the *Labour Relations Act*.

5. The Board is satisfied that the constituent trade unions of the applicant have vested appropriate authority in the applicant to enable it to discharge the responsibilities of a bargaining agent within the meaning of section 10(1) of the *Labour Relations Act*.

6. The Board also finds that the applicant is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council.

7. The Board further finds that this is an application for certification within the meaning of sec-

tion 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

8. The applicant sought a bargaining unit described in the usual form; the respondent disagreed with that description to the extent that the reference to "construction labourers" in the applicant's description should be replaced by the phrase "construction workers" in the respondent's view. The respondent and the employee objectors were afforded an opportunity to make submissions in support of the respondent's position (and the employee objectors joined in that position) and to assert the facts on which their submissions were based. The Board then gave the following oral ruling:

The Board has heard the submissions of counsel for the respondent and of the representative for the employee objectors with respect to the bargaining unit description issue. The Board's practice in describing bargaining units for craft unions in the construction industry is long-standing and uniform for reasons which need not be repeated herein. The Board is not persuaded that the circumstances outlined by respondent counsel and the representative for the employee objectors should lead to a different conclusion in the instant case. Accordingly, the Board finds that the bargaining unit should be described in the usual form as set out by the applicant.

9. The Board further finds that, pursuant to section 144(1) of the Act, the bargaining unit description is as follows:

all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above that rank.

10. The parties reviewed the schedule of employees filed by the employer. The applicant raised a total of eleven challenges as follows:

- (a) James Castell, classified as working foreman, and Manuel Temporas, classified as worker, are asserted by the applicant to be managerial within the meaning of section 1(3)(b);
- (b) Paul Gerber, Irene House, David Mabblerley, Francis MacDonnell, John Mesina, Joseph Pacheco, Ceasar Roias, Christopher Satocles, and Jason Sweezey, all classified as worker, are asserted by the applicant not to be employees within the bargaining unit as at the relevant date.

11. After canvassing the issue as to how to proceed with the parties, the Board ruled that a Labour Relations Officer would be appointed to enquire into and report back to the Board with respect to the challenges just noted. Accordingly, the Board hereby appoints a Board Officer to enquire into and report back to the Board with respect to the duties and responsibilities of

James Castell and Manuel Temporas and with respect to the nature of the work performed at the relevant period by Paul Gerber, Irene House, David Mabblerley, Francis MacDonnell, John Mesina, Joseph Pacheco, Ceasar Roias, Christopher Satocles, and Jason Sweezey.

12. This matter is referred to the Registrar in accordance with the foregoing. This panel is not seized.

3. That panel's subsequent decision dated May 23, 1990 in respect of these proceedings reads as follows:

1. By decision of the Board dated April 9, 1990, the Board, *inter alia*, appointed a Board Officer to inquire into and report back to the Board with respect to the challenges to the schedule of employees, as noted in paragraphs 10 and 11 of that decision.

2. The Board Officer met with the parties on May 2, 3 and 9, 1990. Appearing on behalf of the applicant were: John Moszynski, Keith Rimmington, Steve Leitch and Larry White; on behalf of the respondent, Mark Grossman and Luigi Mesina. Further, Kevin Caldwell appeared on behalf of the employee objectors on May 2, 1990 and had notice of the other scheduled dates but chose not to appear.

3. During the examinations, the parties entered into discussions with the Board Officer and reached the following settlement:

#### Complaint Under Section 89 of the Act

Between:

Labourers' International Union of North America, Ontario Provincial District Council,

Complainant,

- and -

Lume Construction Limited and/or Lume Masonry,

Respondent.

Board File No. 2808-89-U  
2653-89-R

#### Terms of Settlement

1. The complainant hereby withdraws its complaint and its application as it is brought under section 8 of the Act and seeks leave of the Board to do so.
2. The respondent shall pay to the complainant on or before the 18th day of May the sum of three thousand dollars as full and final settlement to all matters in dispute without any admission of any wrongdoing or liability.
3. The respondent shall adjust its records to show that the grievors severed their employment because of permanent lay off.

Dated at Kitchener this 9th day of May, 1990.

Keith Rimmington  
For the Complainant

Luigi Mesina  
For the [Respondent]

The Board notes that the settlement was signed by Keith Rimmington on behalf of the com-



plainant and Luigi Mesina on behalf of the respondent, no one having appeared on behalf of the employee objectors.

4. Pursuant to discussions with the Board Officer, the parties also resolved the issue of the challenges to the schedule of employees filed by the employer. That is, the parties agreed that the schedule shall consist of two persons: Larry White and Kurt Head. Again, K. Rimmington and Luigi Mesina signed the schedule of employees (as amended to show the two employees just named) for the applicant and the respondent respectively; no one appeared on behalf of the employee objectors.

5. As there were no longer any challenges to the schedule of employees and the parties appearing had agreed to the schedule of employees, the Board Officer announced the count, that is, the number of persons in the bargaining unit at the relevant time on whose behalf the applicant filed membership cards in support of the application.

6. The respondent then took the following positions:

- (a) as the applicant and respondent were unable to resolve another matter in connection with a written undertaking sought by the respondent, the documents which were signed were made or executed in "escrow" and should not be presented to the Board but that the proceedings should continue;
- (b) that the intervener was not aware of, nor did he participate in, the circumstances which led to the "settlements" because, at the point the representative of the employee objectors left, the matter was proceeding as an examination of the challenges.

The applicant asserted that the Board should resolve the certification application on the basis of the agreements and, with respect to item (b), that the respondent had no standing to appear on behalf of the employee objectors and make submissions on their behalf.

7. This matter is referred to the Registrar to be listed for hearing so that the respondent may show cause as to why the Board should not proceed with the application for certification on the basis of the April 9, 1990 decision, the schedule of employees agreed to by the applicant and the respondent, the settlement of the section 8 requests and the section 89 complaint as signed by the complainant and the respondent and the count as announced by the Board Officer.

4. Pursuant to that decision, those two files were listed for hearing before the present panel on July 24, 1990 for the purpose set forth in paragraph 7 thereof. At that hearing, counsel for the respondent detailed the evidence which he wished to adduce before the Board in support of his client's contention that the examination proceedings should resume (or begin anew) and that the Board should not proceed with the certification application on the basis of the aforementioned revised schedule of employees that was signed by K. Rimmington, on behalf of the Union, and Luigi Mesina, on behalf of the Company, on May 9, 1990. The position set forth in part (b) of paragraph 6 of that decision was not pursued by the respondent at the July 24 hearing, and although the objectors were duly notified of the hearing, no one appeared on their behalf. Accordingly, it is unnecessary for the Board to address that issue.

5. The essence of the Company's position is that it should not be bound by the aforementioned revised list because it was agreed to by the Company on the basis of a misapprehension that it would be receiving from the Union a "letter of comfort" indicating that the bargaining unit or the application of the Union's I.C.I. provincial agreement would be confined to the Company's mortar mixer and tow motor operator. (Since we are not called upon in these proceedings to determine the legality of such a letter, we make no comment on that matter.) In support of that position, which, it should be noted, does not involve an allegation of fraud, the respondent seeks to adduce evidence concerning discussions that Luigi Mesina (who signed the revised list on behalf of the Company and served as the Company's advisor to counsel throughout these proceedings) and

Mark Grossman (the lawyer who represented the Company at the examination proceedings) had with the Board Officer in the absence of the Union. The Union opposes the introduction of such evidence, and contends that the respondent is bound by the revised list and the Terms of Settlement which Mr. Mesina signed on behalf of the Company.

6. In commenting on the importance of the settlement process and the role played by Board Officers in that process, the Board wrote as follows in *Seven-Up/Pure Spring Ottawa*, [1984] OLRB Rep. Jan. 87:

12. Section 109 of the *Labour Relations Act* provides:

109. Except with the consent of the Board, no member of the Board, nor its registrar, nor any of its other officers, nor any of its clerks or servants shall be required to give testimony in any civil suit or in any proceeding before the Board or in any proceeding before any other tribunal respecting information obtained in the discharge of their duties or while acting within the scope of their employment under this Act.

Subsection (6) of section 111 of the Act provides:

111.-(6) No information or material furnished to or received by a labour relations officer under this Act and no report of a labour relations officer shall be disclosed except to the Board or as authorized by the Board, and no member of the Board and no labour relations officer is a competent or compellable witness in proceedings before a court, the Board or other tribunal respecting any such information, material or report.

13. Settlement is the preferred method of dispute resolution in labour relations matters, as it is in resolution of disputes of any kind. Settlement saves the time and money of the parties and of the public institutions created to adjudicate disputes and enforce the results of adjudication. The results of settlement will both be and seem more responsive to the parties' real differences than will an adjudicated result. The prospects for settlement are dim unless there can be full and frank communication between the parties, in which they can discuss the respective strengths and weaknesses of their positions without later having those discussions turned against them if settlement efforts fail. For that reason, the law has always recognized a privilege attaching to such communications, and the courts have refused to entertain otherwise relevant evidence of statements made by the parties to litigation, when those statements were made in the course of discussions entered into bona fide with the object of a possible settlement.

14. One of the primary [functions] of labour relations officers is to endeavour to effect the settlement of disputes submitted to the Board for resolution. This role is mandated by the Act in the case of unfair labour practice complaints (see section 89(2)) and construction industry grievance referrals (see section 124(2)). Labour relations officers are also routinely assigned to other types of application, including certification applications, wherein they also endeavour to achieve either a full settlement of contentious issues or, at least, a narrowing of the issues requiring adjudication. As a review of the Board's Annual Reports will disclose, the vast majority of cases coming before the Board are settled as the result of the efforts of labour relations officers.

15. By the time an application is filed with the Board, the parties have often settled into apparently rigid positions from which they are unable to make settlement overtures directly to the opposite party. In this climate, and in indeed in any situation in which he becomes involved, a labour relations officer functions as more than a messenger. He seeks from the parties, in confidence, information concerning the strengths and weaknesses of their position, the factual context which they feel obliges them to take the positions they have taken, and the accommodations which might be acceptable. The labour relations officer must be in a position to assure each party not only that he or she will treat the information sought as confidential and withhold disclosure from the opposite party, but also that disclosure to the opposite party cannot later be compelled should settlement efforts fail. This confidence must be absolute. It is of little use to a labour relations officer to tell a party that his discussions will be kept confidential if he must, at the same time, admit the existence of a number of exceptions to this rule, any of which may

result in the compelled disclosure of their supposedly confidential discussion. In this regard, the legislature has recognized in sections 109 and 111(6) that the common law privilege extended to communications in furtherance of settlement might not be a sufficient protection for the role to be discharged by a labour relations officer. The Legislature has therefore provided in section 109 and subsection 111(6) that the Board's officers may not be compelled to testify respecting information obtained in the discharge of their duties. The firmness of the Legislature's resolve in this regard is demonstrated by the speed with which it responds to any discovery that there is a gap in the protection afforded by these provisions (see *Re Dorothea Knitting Mills Ltd. and Canadian Textile & Chemical Union et al* (1975) 9 O.R. (2d) 378 (Div. Ct.) a decision dated May 13, 1975 to which the Legislature responded in S.O. 1975, C.76, sections 25 and 26, by repealing the predecessors of sections 109 and 111(6) and replacing them with the present provisions. S.O. 1975 C.76 came into force upon receiving Royal Assent July 18, 1975).

16. Sections 109 and 111(6) each afford the Board a discretion to permit disclosure. In exercising that discretion, however, the Board remains sensitive to the importance of the settlement process and the damage that would be done to that process by carving out any exception to the general privilege it assigns to communications in furtherance of settlement: *Crown Electric*, [1978] OLRB Rep. April 344. The Board also recognizes the difficulty, if not the impossibility, of trying to apply the privilege selectively so as to admit, for example, evidence of isolated statements made by an officer to a party, even for the limited purpose of explaining that party's resulting behaviour: *Auto Jobbers Warehouse Ltd.*, [1982] OLRB Rep. May 649. Quite apart from any question of compelling the testimony of a labour relations officer, the willingness of the Board to accept the testimony of any witness to communications to or from a labour relations officer will be strongly influenced by the Board's concern to protect the integrity of the settlement process, and efficacy of the labour relations officer's important role in that process: *Crown Electric*, *supra*, and *Auto Jobbers Warehouse Limited*, *supra* (see also *A.J. (Archie) Goodale Ltd.*, [1977] Can. LRBR 309 (CLRB) at pages 315-316 for a review of this issue as it arises under the Canada Labour Code; and see *CCH Canadian Limited*, [1974] OLRB Rep. June 375 for discussion of the similar principles applicable to the receipt of evidence of discussions with conciliators during the bargaining process and the effect of subsections (2) to (5) of section 111 of the Act).

7. The following excerpts from *Crown Electric*, [1978] OLRB Rep. Apr. 344, are also quite apposite:

8. .... An officer mediating a dispute between two parties needs a wide latitude to conduct free and confidential discussion. The chances of success in mediation will be enhanced to the extent that the parties and the officer can know that their statements will not themselves be a cause of further dispute or be subject to close scrutiny in subsequent proceedings.

9. Thus it is that a statutory privilege and immunity has been included in the Act with respect to communications received by a Labour Relations Officer. Section 100(6) [now section 111(b)] of the Act provides:

100(6) No information or material furnished to or received by a labour relations officer under this Act and no report of a labour relations officer shall be disclosed except to the Board or as authorized by the Board, and no member of the Board and no labour relations officer is a competent or compellable witness in proceedings before a court, the Board or other tribunal respecting any such information, material or report.

While that section allows the Board a discretion to permit the disclosure in its own proceedings of communications made to a labour relations officer, it recognizes the sensitive nature of the officer's role and contemplates that information of that kind will not be disclosed as of course. While each case must be determined on its own merits, the Board will generally apply the section as so to render privileged any communications made privately between one of the parties and the labour relations officer in the absence of the other party. The privilege thus extended is analogous to the privilege attaching to private communications between a party negotiating a collective agreement and a conciliator or mediator assisting the parties (cf. *CCH Canadian Limited* [1974] OLRB Rep. June 375).



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16. Counsel for the union argued alternatively that extrinsic evidence should be admitted to establish either a unilateral or mutual mistake. This is a case where all communications were made through the medium of a labour relations officer who dealt with each party out of the presence of the other. In order to protect the integrity of the Board's accommodative process these communications are protected by a statutory privilege. In these circumstances we see no reason for the admission of extrinsic evidence to support the application of the doctrines of unilateral or mutual mistake.

17. Parties who enter into written settlements have a responsibility to ensure that they are fully aware of the implications of any document to which they attach their signatures. In the absence of any allegation of fraud the Board must assume that parties have agreed to any settlement plainly expressed in a written document, or otherwise no settlement would be immune from a subsequent challenge. We do not regard the applicant's argument as containing an allegation of fraud and, therefore, we are not prepared to accept extrinsic evidence on this basis.

8. As indicated in those decisions, to protect the integrity of the settlement process and the efficacy of the important role played by Board Officers in that process, the Board, as empowered by the provisions of the Act, gives settlement discussions in respect of proceedings under the Act even broader protection than that afforded to settlement discussions by common law privilege. Thus, *Cameron Packing Ltd. v. Ruddy* (1963), 41 C.P.C. 154 (O.H.C.), and the other judgments to which we were referred by respondent's counsel are not determinative of the issue before us as they are confined to privilege under the common law, and do not involve settlement discussions conducted under the auspices of a Board Officer with the attendant statutory privilege afforded by sections 109 and 111(6) of the Act, and by the Board's broad discretionary powers with respect to the receipt of evidence in proceedings before it. We have also duly considered the authorities cited by respondent's counsel concerning the effect of various types of mistakes upon contractual relations under the law of contract, but have found them to be of little assistance in the circumstances of this case and its labour relations context.

9. In the instant case, the revised list was signed by Mr. Mesina on behalf of the respondent, which was represented by legal counsel throughout the aforementioned examination proceedings and settlement discussions. That the revised list was intended by the applicant and the respondent to resolve all of their disputes concerning the list is abundantly clear from the following words which appear on that document immediately above the signatures of Mr. Mesina and Mr. Rimmington:

The Parties hereby agree that the foregoing list of two employees shall constitute the list for purposes of the count in Board File No. 2653-89-R consisting of 2 employees.

10. It is common ground between the applicant and the respondent that prior to the execution of that document, the respondent had received the following letter:

To Mr. Luigi Messina [sic]  
Lume Masonry

From K. Rimmington  
Labourers Int'l Union

Re Supply of Labourers

Dear Sir,

This correspondence will verify that it is our understanding that in the event that both Labourers do not show for work, until the Labourers union does supply a Labourer and the Labourers have been informed of the absences it will be permissible for a non-bargaining unit person to perform bargaining unit work until the Labourer is sent by the Union or hired by the Employer.

Dated at Kitchener this 9th day of May 1990.

"K. Rimmington"  
Keith Rimmington

11. Prior to signing the revised list, Messrs. Mesina and Rimmington had also each signed the "Terms of Settlement" quoted above (in paragraph 3 of the decision dated May 23, 1990). Neither that document nor the revised list makes any reference to the provision of a "letter of comfort". Similarly, neither indicates that it was made or executed in escrow. If, as contended by respondent's counsel at the hearing of this matter, obtaining a "letter of comfort" was of fundamental importance to the respondent and formed the basis of its preparedness to resolve the matters in dispute between the parties, the respondent should either have insisted that it be provided (as was the above-quoted letter) in advance of signing the Terms of Settlement and the revised list, or that its provision be made an express term of one or both of those documents. Having proceeded to sign those documents and to receive the count from the Board Officer, the respondent cannot go behind that signed documentation, with a view to altering or effectively eliminating it, by adducing evidence of the settlement discussions which preceded it. If this were to be permitted, settlements would cease to be a reliable means of resolving litigious matters, and the Board's settlement processes would be of much less benefit to the labour relations community.

12. Moreover, to permit the respondent to adduce evidence concerning settlement discussions between its representatives and the Board Officer would inevitably lead to the applicant seeking to adduce evidence concerning discussions which its representatives had with the Board Officer in the absence of the respondent, and might also create a situation in which the Board Officer, whose continued ability to perform his important functions under the Act is heavily dependent upon his actual and perceived neutrality, would be called upon to "take sides" in the dispute by giving evidence supportive of the position advanced by one or the other of the parties. It might also place the Board in the highly undesirable position of having to choose between testimony of the Board Officer and testimony of one or more of the parties' representatives on the basis of credibility. All of these very real possibilities underline the inappropriateness of entertaining evidence of the type which the respondent seeks to adduce in order to remove itself from a situation which could easily have been avoided by the exercise of due diligence on the part of its representatives. For the reasons set forth above, the Board is not prepared to countenance any such undermining of its settlement procedures.

13. We also find no merit in Company counsel's contention that the Board should not accept the aforementioned agreement between the applicant and the respondent with respect to the list because (in his submission) there were more than two persons in the employ of the respondent who performed labourers' work for a majority of the time on the day of the application. Respondent's counsel also urged us to consider the evidence which was adduced before the Board Officer on May 2 and 3, 1990 (which evidence was tape recorded but not reduced to the form of a transcript in view of the signing of the aforementioned revised list). However, we are of the opinion that it would be inappropriate for the Board to do so. That evidence consists of the complete examination of only one person and the partial examination of a second individual. It does not include evidence of any of the other people in dispute, nor evidence of any of the other witnesses who, if the examinations had proceeded, might have been called by a party to give evidence concerning the subject matter of the examinations. Where, as in the present case, the parties participating in the proceedings resolve their disputes concerning the list of employees, it is entirely appropriate for the Board to make its section 7(1) (and section 144(2)) determination of the number of employees in the bargaining unit at the pertinent time on the basis of the revised list to which they have agreed. Thus, we find no merit in Company counsel's submission that section 7(1)

requires the Board to conduct an inquiry into the accuracy of the list in the circumstances of this case.

14. The Board is satisfied on the basis of all of the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of one of the constituent trade unions of the applicant and therefore, pursuant to section 10(3) of the Act, are deemed to be members of the applicant on February 12, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the Act, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

15. In addition to the applicant's documentary evidence of membership, a petition was filed with the Board in opposition to the application. The Board generally takes such petitions into account in deciding whether to exercise its discretion under section 7(2) of the Act to order a representation vote notwithstanding documentary evidence of membership which demonstrates that more than fifty-five per cent of the employees in a bargaining unit are "members" within the meaning of section 1(1)(l) of the Act. In this case, however, even if the petition is entirely voluntary, the applicant will still have the unequivocal support of more than fifty-five per cent of the employees in the bargaining unit. Accordingly, it is unnecessary to undertake the inquiry (into the origination of the petition and the manner in which each of the signatures on it was obtained) contemplated by section 73 of the Board's Rules of Procedure since, in the circumstances of this case, the petition would not in any event prompt us to exercise our discretion under section 7(2) of the Act to direct the taking of a representation vote.

16. Pursuant to section 144(2) of the Act, a certificate will issue to the applicant on its own behalf and on behalf of all of the affiliated bargaining agents of the employee bargaining agency (named in paragraph 6 of the above-quoted decision dated April 9, 1990) in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

17. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant in respect of all construction labourers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

18. The complaint in File No. 2008-89-U is withdrawn at the request of the Union and with leave of the Board.

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**0786-90-M Metropolitan Toronto Police Association, Applicant v. Office and Professional Employees International Union, Local 343, Respondent**

**Employee Reference - Reference merely decides whether a person is an "employee" within the meaning of the *Labour Relations Act* - Issue of whether a person is an employee in a bargaining unit should be determined by arbitration**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair, and Board Members *W. A. Correll* and *E. G. Theobald*.

**DECISION OF THE BOARD;** August 29, 1990

1. The applicant employer seeks to have the Board determine, pursuant to section 106(2) of the *Labour Relations Act*, whether Robert Bundy (who is classified as a "Network/Communications Co-ordinator") is an "employee" within the meaning and for the purposes of the *Labour Relations Act*.

2. The applicant submits that Bundy has access to its computer files, including those files dealing with confidential matters relating to labour relations. The applicant states that in settling the last collective agreement between them, the parties agreed that:

The issue of whether the Network/Communications Co-ordinator is an employee and therefore excluded or included from the bargaining unit will be referred to the Labour Relations Board pursuant to section 106. The employer's withdrawing its demands with respect to Article 3.01 without abandoning its position that the Network/Communications Co-ordinator be excluded.

3. The respondent trade union requests that the application be dismissed on the basis that:

Robert Bundy's position as Network/Communications co-ordinator should properly be a part of the bargaining unit. With respect to the "sensitive nature of the new position" our view is that given the type of work performed by members of Office & Professional Employees International Union, Local 343 for the Metropolitan Toronto Police Association a high degree of discretion and confidentiality is implicit as a condition of employment. Indeed, were we to accept the employer's position, we could anticipate other applications to exclude a good percentage of our bargaining unit. While we are in the unusual position of being a trade union representing the support staff employed by another "trade union" our view is that the benefits of unionization and basic trade union rights should be extended "on principle" to employees who do not exercise a management function, that is the power to hire and fire.

4. In an application under section 106(2) of the *Labour Relations Act*, the issue is *not* whether or not the persons with respect to whom it is made are employees in a bargaining unit. The issue is whether or not they are "employees" within the meaning and for the purposes of the *Labour Relations Act*. Although a determination of a person's "employee" status may, for practical purposes, go some way toward resolving any issue with respect to whether or not s/he is in a bargaining unit, the two issues are not necessarily congruent. A finding that a person is an "employee" does not necessarily mean that that person is in a bargaining unit. The latter is a question for a Board of Arbitration to determine (see *Re Miller et al and Algoma Steelworkers Credit Union Ltd. et. al.* (1974) 6 O.R. (2d) 676 (Ont. Div. Ct.); *Nelson Crushed Stone*, [1980] OLRB Rep. Oct. 1500; *Northern Telecom*, [1983] OLRB Rep. Jan. 95; *The Windsor Star*, [1988] OLRB Rep. Apr. 427). Consequently, a determination that the persons with respect to whom this application is made are "employees" will not necessarily mean that they, or any of them, are also in the bargaining unit covered by the collective agreement between the parties.

5. However, it appears that there is a dispute between the parties concerning the "employee" status of the persons named by the applicant. Consequently, and having regard to the Board's jurisprudence in the area, the Board finds it appropriate to authorize a Labour Relations Officer, to be designated by the Board's Manager of Field Services, to inquire into and report to the Board with respect to the duties and responsibilities of the persons named by the applicant as set out in paragraph 1 above.

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**2933-89-R; 3192-89-U** Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91, Applicant v. **National News Company Limited**, Respondent v. Group of Employees, Objectors; Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91, Complainant v. National News Company Limited, Respondent

**Certification - Intimidation and Coercion - Representation Vote - Unfair Labour Practice - Intimidatory statements made by one employee to another during an organizing campaign - Statements not made by a collector or on behalf of the union - Peer pressure during organizing drive not relevant to reliability of membership evidence - Board will not order a representation vote where a statement about union dues is made by a rank and file employee - Certificate issuing**

**BEFORE:** *Nimal V. Dissanayake*, Vice-Chair, and Board Members *R. W. Pirrie* and *K. Davies*.

**APPEARANCES:** *Linda Huebscher*, *John Raudoy*, *Manon Cayer* and *Michael Quigg* for the applicant/complainant; *Donald B. Jarvis* and *Phil Patenaude* for the respondent; *Anne McAllister* for the objectors.

**DECISION OF THE BOARD;** August 16, 1990

1. File No. 2933-89-R is an application for certification. File No. 3192-89-U is a complaint filed by the applicant union under section 89, alleging that the employer has contravened sections 3, 64, 66 and 70 of the Act.

2. Prior to these matters coming before the Board for a formal hearing, the parties met with Board Officer William Jackson and resolved a number of issues relating to the application for certification. Accordingly, the name of the respondent employer is amended to read: "National News Company Limited".

3. The parties also agreed upon the following bargaining unit description:

all employees of the respondent in the Regional Municipality of Ottawa Carleton, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than (24) twenty-four hours per week and students employed during the school vacation period.

4. The Officer disclosed to the parties "the count", that is the number of employees in the agreed upon bargaining unit on the application date and the number of these employees who were members of the applicant on the terminal date. The applicant's level of membership support was such that it would normally have been entitled to certification under section 7(2) of the Act.

5. However, also filed prior to the terminal date was a statement of objection to certifica-

tion ("a petition"). This petition contained a sufficient overlap of signatures as would normally cause the Board to direct a representation vote, if it was satisfied of its voluntariness. In addition, the respondent also filed particulars of allegations that the applicant had engaged in conduct in contravention of section 70 of the Act in the course of its organizing drive and claimed that as a result the membership evidence filed in support of the application was not reliable. A hearing was convened in Ottawa to deal with the issues of the voluntariness of the petition, the allegations with respect to the membership evidence and the unfair labour practice complaint against the respondent. The two files were consolidated.

6. At the commencement of the hearing on June 11, 1990, Ms. Anne McAllister, counsel for the objecting employees, advised the Board that she had instructions from her clients to withdraw the petition. The Board consented to the request to withdraw the petition.

7. That left for determination by the Board, the allegations with respect to the membership evidence and the unfair labour practice complaint. The Board ruled that it would first deal with the former issue before hearing evidence and submissions on the unfair labour practice complaint in File No. 3192-89-U.

8. The Board heard evidence and submissions with regard to the respondent's allegation that the membership evidence filed in support of the application for certification was obtained in contravention of section 70 and hence unreliable as an expression of the true wishes of the employees. The Board orally ruled that the respondent had not established a contravention of section 70 as would cause the Board to doubt the reliability of the membership evidence and that accordingly the applicant was entitled to certification without the need for a representation vote. Following that ruling, the applicant union requested leave of the Board to withdraw its unfair labour practice complaint in File No. 3192-89-U and the Board granted the request.

9. The Board now sets out its reasons for its ruling relating to the membership evidence. The charges centre around two alleged incidents involving Mr. Peter Cray, a driver employed with the respondent for some 30 years. Mr. Cray and Mr. Wilf Gauthier, another driver, were good friends and had known each other ever since Gauthier started working for the respondent some ten years ago. They frequently met for coffee at a donut shop located close to the workplace. According to Cray on Friday, February 9, 1990, which was an off day for him, he met Gauthier at the donut shop. Gauthier told him "you owe me \$5.00". When Cray inquired why, Gauthier told him it was for the union. Cray informed Gauthier that he did not want a union to come in. According to Cray, Gauthier then said words to the effect "the union is coming in. If you don't join you won't be able to work for the company because its going to be a closed shop". Cray testified that during this conversation Gauthier had in his hand what he believed to be a "union card". Cray testified that he was worried because he had worked for the respondent a long time. When the respondent's counsel asked if he felt intimidated by what Gauthier told him, Cray responded "just a little bit".

10. On the following Monday, Cray approached his immediate supervisor, Mr. John Gourgan. Cray testified that Gourgan was "kind of a friend" and he had known him for over twenty years. He related to Gourgan what Gauthier had told him and asked if it was true that he would lose his job if he did not join the union. Gourgan assured Cray that what Gauthier told him was untrue and that only the company management could cause Cray to lose his job.

11. According to Cray a second incident occurred on Tuesday, February 13, 1990. Cray was loading his truck at the start of his shift and Gauthier was helping him. Cray testified that Gauthier told him "if you don't join the union now by paying \$5.00, it will cost you \$125.00 to join later". Later that morning, Cray again related to Gourgan what Gauthier had told him and asked if it was true. Gourgan informed him that he did not know what the rules relating to union dues were.



12. Cray's evidence is that there were no other employees present when Gauthier made either of the alleged statements, which he took to be threats. Since Gauthier was not called to testify, Cray's evidence remains uncontradicted. Furthermore, Mr. Gourgan confirmed that Cray talked to him about the statements as claimed. Thus the Board finds that Gauthier did make the alleged statements to Cray. The issue is, what effect, if any, that has on the reliability of the membership evidence filed in support of the application.

13. The applicant's evidence is that Mr. Michael Quigg was the driving force behind the employees organizing attempt. Quigg consulted with Mr. John Raudoy, an organizer for the union. Both Quigg and Raudoy testified. They testified that the first concrete step towards unionization was when the employees were invited to attend a union meeting on February 21, 1990 at a donut shop. At the meeting, Raudoy addressed those in attendance and described what the unionization process involved, and answered questions from the employees. He testified that he mentioned that the dues were set at \$5.00 because the union intended to file simultaneous applications with the Ontario Labour Relations Board and the Canada Labour Board because there was some uncertainty as to the appropriate jurisdiction. He told the employees that once certified, he would encourage the union to negotiate a union shop and that the union's usual initiation fee was \$125.00. He specifically stated that the initiation fee is waived during the organization campaign and that even if a union shop clause is negotiated, those employees who had not already done so would have the opportunity to join the union for \$5.00 during a period of 30 days following the execution of the collective agreement. During this meeting Raudoy had a stack of union cards on the table. Employees had access to these cards and a number of them signed them. According to the applicant's witnesses no union cards were in circulation until Mr. Raudoy brought them to this meeting on February 21, 1990.

14. The evidence is clear that Cray never signed a union card. While he approached his supervisor, he did not ask either Mr. Quigg or Mr. Raudoy, who he had occasion to meet, to verify the statements of Gauthier. Nevertheless, Quigg heard by way of rumour that Cray was threatened by someone. Quigg sought out Cray and inquired who had made the alleged threats and Cray told him it was Gauthier. Cray referred to Gauthier's remark about having to pay \$125.00 to join the union later. Quigg explained that it was not a threat, that even after certification he would be able to join the union for \$5.00. The next day Quigg spoke to Gauthier and asked him to "straighten things out" with Cray. Sometime later Gauthier reported to him that he had spoken to Cray and that "there was no problem now".

15. The applicant's evidence is that only Quigg, Raudoy and another employee, Mr. Randy Cayer were issued union cards and requested to sign up members. Quigg and Raudoy categorically denied that Gauthier was "a collector", or had any role to play on behalf of the union. Mr. Raudoy candidly agreed that if one employee had "signed up" a fellow-employee, he would have readily accepted the membership application. However, it is the evidence of both Quigg and Raudoy that they received no signed up membership applications from anyone other than themselves and Randy Cayer. They specifically deny that they received any memberships from Gauthier.

16. The Board has concluded that the foregoing facts do not cast a doubt on the reliability of the membership evidence filed as indicating the true and voluntary wishes of the employees who signed. While counsel cited a number of prior Board decisions where a representation vote had been directed as a result of similar statements being made, in all of those cases the statement was made by a collector on behalf of the union. The Board has recognized that peer pressure during an organizing drive is not relevant to the reliability of membership evidence (see, *Baltimore Aircoil Inter American Corp.*, [1982] OLRB Rep. Oct. 1387). Similarly, the Board has held that it will not direct a representation vote where a statement is made about union dues, such as the one made

here by Mr. Gauthier, where it is made by a rank and file employee (see, *Crenmar Services Ltd.*, [1987] OLRB Rep. Jan. 48).

17. Counsel for the respondent urged the Board to infer from the union's failure to call Mr. Gauthier to testify that he indeed was "a collector" on behalf of the union. However, the Board cannot do so in light of the evidence before it. Quigg and Raudoy both testified that in addition to themselves, the only other person who "collected" memberships on behalf of the union was Randy Cayer. The Board has reviewed the membership applications filed. The only collectors on the cards are Quigg, Raudoy and Cayer. Counsel suggested that the union might have weeded out any cards collected by Mr. Gauthier knowing that it would have problems if Mr. Gauthier is linked with the union as a collector. There is no evidence to reach such a conclusion even by inference. On the contrary, the evidence suggests that Mr. Gauthier could not have been "a collector" at the time he made the statements to Mr. Cray. An examination of the membership evidence reveals that the earliest date on which a card was signed was February 21, 1990, - the day of the meeting at the donut shop. This appears to corroborate the union's evidence that the meeting on February 21 was the first concrete step taken towards unionization and that no membership applications were available until Mr. Raudoy brought them to the meeting on February 21. Mr. Cray testified that he had absolutely no experience with trade unions. We have every reason to believe that Cray was mistaken when he believed that what Gauthier carried in his hand on February 9, 1990 was "a union card". If membership applications were available for solicitation as early as February 9th, it is highly unlikely that the main organizers such as Quigg and Raudoy would not have signed up at least a few employees well before February 21st. All of the evidence points to the inescapable conclusion that solicitation of employees on behalf of the union did not commence until the meeting held on February 21st.

18. While Gauthier did make intimidatory statements to Cray, we are satisfied this was nothing more than a case of an employee trying to influence his good friend to join the union. In reaching this conclusion, we note that the respondent had the onus of satisfying the Board that the membership evidence was not reliable. Gauthier was an employee with the respondent. If the respondent wished to contradict the union's evidence that Gauthier was not a collector and that he did not submit any cards to the union, it was open for it to call Gauthier. Having failed to do so, the respondent cannot expect this Board to make an adverse inference from the union's failure to call Gauthier to contradict the evidence already before it.

19. In all of the circumstances, the statements made by Gauthier can only be viewed as ones made by one employee to another and can have no bearing on the reliability of the membership evidence filed.

20. Having regard to the foregoing finding and the withdrawal of the petition, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit described in paragraph 3 above, at the time the application was made, were members of the applicant on March 9, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

21. Accordingly, a certificate will issue to the applicant.

22. As already noted the complaint in File No. 3192-89-U is withdrawn.

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**0107-90-OH Manuel Puche, Complainant v. Bo Ramjit, Respondent**

**Damages - Discharge - Health and Safety - Remedies - Complainant was suddenly dismissed for tardiness after speaking to a Health and Safety Inspector - Complainant had a genuine tardiness problem but had not hitherto been disciplined or warned of discharge - Circumstances leading to inference of employer "anti-safety animus" - Complainant seeking monetary compensation only - Complainant was in jeopardy of discharge for tardiness and was already looking for other work - Remedy not meant as windfall - Board awarding \$4,500 damages**

**BEFORE:** *Louisa M. Davie*, Vice-Chair, and Board Members *M. Rozenberg* and *K. Davies*.

**APPEARANCES:** *Manuel Puche* for the complainant; *Bo S. Ramjit* and *David Sly* for the respondent.

**DECISION OF THE BOARD;** August 29, 1990

1. This is a complaint alleging that the respondent Bo Ramjit violated section 24 of the *Occupational Health and Safety Act* ("OHSA" or "the Act") by discharging the complainant because the complainant sought the enforcement of the Act or the regulations to the Act.

2. The Board notes that the complainant and the respondent appeared without legal counsel. The respondent acted on his own behalf although he did have an advisor present on the first day of the hearing. The Board commented that there was no requirement that persons appearing before the Board have legal counsel. The Board not infrequently conducts hearings where one or more parties are unrepresented. The Board noted however that Board hearings are legal proceedings and persons appearing on their own behalf do bear any risk involved with appearing on their own behalf. We indicated that the Board's function is to adjudicate. It would be inconsistent with our role as adjudicators to become an advocate for, or advisor to, any party to the proceeding because that party is unrepresented by counsel. In this instance however, the Board did explain the process to be followed to the complainant and the respondent both initially and throughout the proceeding. We also indicated, at various stages of the proceedings, that the issue before the Board was whether the respondent had discharged Mr. Puche because of Mr. Puche's attempt to exercise rights under the *Occupational Health and Safety Act*.

The Adjournment Request

3. During the course of the hearing the respondent requested an adjournment of certain scheduled hearing dates. This request was opposed by the complainant. After hearing the submissions of both parties the Board dismissed the respondent's request for an adjournment and indicated that our reasons for so doing would be stated in the written decision in respect of the merits of the complaint. We now provide our reasons.

4. This matter first came on for hearing on May 22, 1990. The matter was not concluded on that day, and by letter dated June 6, 1990, the Registrar advised the parties that the hearing would be continued on July 30 and 31, 1990. By letter dated June 11, 1990, the respondent requested an adjournment of those dates because his "advisor", Mr. David Sly, was not available on those dates.

5. The usual practice of the Board is to grant an adjournment only on the consent of all the parties to the proceeding or where the request is based on circumstances beyond the control of the party making the request and where to proceed would seriously prejudice such party. (See for



example *Catalyst Technology (Canada) Ltd.*, [1987] OLRB Rep. June 803 at page 805 and the cases referred to therein.)

6. The Board has the discretion to adjourn any hearing if it considers it advisable or in the interest of justice to do so. (See section 82(1) of the Board's Rules of Procedure, and section 21 of the *Statutory Power of Procedure Act*, R.S.O. (1980) Chapter 484 as amended.) In the exercise of that discretion the Board is guided by a number of principles including the importance of expedition in labour relations and employment matters.

7. In *Re Flamboro Downs Holdings Ltd. & Teamsters Local 879* (1979), 24 O.R. (2d) 400 at pages 404 and 405 the Ontario Divisional Court stated:

"Clearly, an administrative tribunal such as the Labour Relations Board is entitled to determine its own practices and procedures. Whether in a given case an adjournment should or should not be granted is a matter to be determined by the Board charged as it is with the responsibility of administering a comprehensive statute regulating labour relations. In the administration of that statute the Board is required to make many determinations of both fact and of law and to exercise its discretion in a variety of situations. In the case of a request for adjournment, it is manifestly in the best position to decide whether, having regard to the nature of the substantive application before it, the adjournment should be granted or whether the interests of the employer, the employees or the union who, as the case may be, oppose the adjournment should prevail over the party seeking it. As a matter of jurisdiction, it is for the Board to decide whether it should adjourn proceedings before it and in what circumstances.

This is not to say that there cannot be situations in which a refusal to grant an adjournment might amount to a denial of a natural justice. There are circumstances in which that might be so: see, for example *R. v. Ontario Labour Relations Board, Ex p. Nick Masney Hotels Ltd.* [1970] 3 O.R. 461, 13 D.L.R. (3d) 289 (C.A.); *Re Gill Lumber Chipman (1973) Ltd. and United Brotherhood of Carpenters & Joiners of America, Local Union 2142* (1973), 42 D.L.R. (3d) 271, 7 N.B.R. (2d) 41. It is necessary to examine the facts of each case to determine if the tribunal acted, as it must, in a fair and reasonable way. It must, of course, comply with the provisions of the *Statutory Powers Procedure Act* 1971 (Ont.) c.47, and afford the parties the opportunity to be present and be represented if they wish by counsel. *But a party who has adequate notice of the hearing does not have a right to an adjournment and is not entitled to insist on one for his convenience or the convenience of his representative.* It is for the Board to determine whether to adjourn on the basis of the obvious desirability of speedy and expeditious proceedings in labour relations matters, the background of the particular case, the issues involved, the reason for the request and other like factors.

...

It cannot be suggested that the Board may not in the exercise of its [sic] discretion adopt a general policy respecting adjournments of its proceedings: see *The King v. Port of London Authority, Ex p. Kynock, Ltd.*, [1919] 1 K.B. 176. That policy is obviously necessary to the proper administration of the Board's process..."

[emphasis added]

8. As noted, Manuel Puche opposed the adjournment request. In his submissions he indicated that he wished to have his case dealt with expeditiously, that he had subpoenaed witnesses to attend on the scheduled hearing dates, that those witnesses might not be available on other dates if the hearing was adjourned and rescheduled, and that he had to travel out of the country for personal reasons in the near future and would thus be prejudiced by an adjournment and rescheduling of the hearing.

9. For his part, Mr. Ramjit advanced only the unavailability of his "advisor" Mr. Sly as a reason to grant the adjournment. We note that Mr. Sly is not a lawyer. Although present on the

first day of hearing Mr. Sly did not actively participate in the hearing. He did not examine or cross-examine any witnesses or address any submissions to the Board. That was all done by Mr. Ramjit himself. Mr. Ramjit may have consulted with Mr. Sly during the course of the hearing and may have gained advice from such consultation but it was Mr. Ramjit and not Mr. Sly who had carriage of the case.

10. In this case Mr. Ramjit was aware of Mr. Sly's unavailability at least six weeks prior to the scheduled hearing date as evidenced by his written request for an adjournment dated June 11, 1990. The Registrar advised Mr. Ramjit by letter dated June 20, 1990 that:

... I would advise that a party seeking an adjournment of the scheduled hearing must obtain the consent of all parties to the proceeding, otherwise such request must be made before the panel hearing the case.

In our view Mr. Ramjit had ample opportunity to retain and instruct another "advisor" or lawyer in this matter. In these circumstances, we were of the view that the complainant's right to an expeditious hearing would be seriously prejudiced if the Board granted the adjournment. Weighed against such prejudice was the inconvenience which the respondent would or could suffer because his "advisor" was not present in the hearing room. That inconvenience could easily have been avoided had Mr. Ramjit retained another "advisor" when he was notified that his request for an adjournment would not automatically be granted as of right. For these reasons the request for an adjournment was dismissed.

### The Complaint

11. We now turn to examine the facts in this case. Before so doing we find it appropriate to briefly review the applicable law within which we propose to assess the evidence before us.

5. Section 24 of the O.H.S.A. reads as follows:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed

under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply, with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

(8) Notwithstanding subsection (2), a person who is subject to a rule or code of discipline under the *Police Act* shall have his complaint in relation to an alleged contravention of subsection (1) dealt with under that Act.

12. As was noted by the Board in *Commonwealth Construction Company*, [1987] OLRB Rep. July 961 at paragraph. 21:

... It is important to understand that what is protected by the Act is the right of employees not to be threatened or disciplined *because* of their acting in compliance with the Act (or regulations etc.) or seeking its enforcement. An employee might engage in conduct warranting discipline, and in those circumstances an employer can impose discipline, *provided the discipline is not motivated even in part by a concern that the employee was acting in compliance with or seeking to enforce the Act*. Discipline levied for that reason is proscribed by section 24(1). Whether a breach is found will depend on whether the Board concludes that the disciplinary response *was even partially prompted* because the employee was seeking to exercise his or her rights under the Act. In this respect, the Board's inquiry under section 24 of the this [sic] Act parallels the nature of the inquiry under section 89 of the *Labour Relations Act*.

[emphasis added]

13. As was stated by the Board in *Ministry of Community and Social Services*, [1988] OLRB Rep. Jan. 50 at paragraph 19:

...

Conduct which seeks enforcement of the Act is protected activity in order to encourage workers to raise health and safety concerns with their employer and others and to thereby reduce the likelihood of injury in the workplace.

14. In assessing whether an employee's discharge was a violation of the OHSA, we must look to *all* the circumstances surrounding the discharge to determine whether the discharge was motivated in whole or *in part* by the complainant's safety related activities or his exercise of rights conferred upon him by the OHSA.

15. In appropriate cases, an employer's conduct which is arbitrary, patently unfair or unreasonable, unduly harsh, precipitous or a response which is extraordinary given the employer's previous practice may lead to an inference of "anti-safety animus". In contested section 24(1) complaints, one would not normally expect an employer to openly and candidly admit it acted in contravention of the O.H.S.A. For this reason, the Board carefully scrutinizes the employer's conduct and surrounding circumstances to determine if the "true" or "real" motives (*or one of the*



*motives*) of the employer was “tainted” by the employer’s “anti-safety animus”, or more correctly the employer’s animus towards the employee because the employee sought enforcement or compliance with the OHSA.

16. The analysis the Board uses in making that determination parallels the analysis that it uses when dealing with complaints made pursuant to section 89 of the *Labour Relations Act*. Like section 89 of the *Labour Relations Act*, section 24 also contains a reverse legal onus provision. As was noted in *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745:

... the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer’s conduct.

This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the act has occurred.

17. The same considerations and analysis apply in determining whether section 24(1) of the Act has been violated. In first determining whether an employer has acted in contravention of section 24(1) of the Act we cannot be “unduly swayed by either the coexistence of fair treatment or by the coexistence of legitimate reasons for the employer’s conduct”. If the employer has satisfied us that *no part* of the reason for the discharge was because Mr. Puche acted in compliance with the Act or the regulations or because he sought the enforcement of the Act or the regulations, the respondent would not have violated section 24(1) of the Act.

18. We heard the evidence of four witnesses including the complainant and the respondent. We find the relevant facts to be as follows.

19. Mr. Bo Ramjit is the sole owner of Vogue Interiors. Vogue Interiors is in the business of custom wood working manufacturing. In addition to Mr. Ramjit, Vogue Interiors employs anywhere from three to five employees.

20. Mr. Manuel Puche was hired as a machine operator and commenced work with Vogue Interiors on October 30, 1989. Shortly after he commenced working at Vogue Interiors, Mr. Puche raised a number of health and safety concerns with Mr. Ramjit. We find that until his termination on April 3, 1990, while Mr. Puche was employed at Vogue Interiors, he spoke to Mr. Ramjit on several occasions about various health and safety matters ranging from inadequate ventilation and the presence of exposed live wires on the plant floor to the lack of heat in the premises, lack of lighting in the washroom facilities, lack of hot water on the premises, and the unavailability of a first aid kit. Mr. Ramjit took no steps to correct any of the safety concerns which were brought to his attention.

21. We also find that Mr. Puche exhibited poor time keeping habits while employed at Vogue Interiors. He would often come in late, leave early or take extended breaks. On some occasions he would ask permission to come in late or leave early but those occasions appear to be infrequent and relate to times when Mr. Puche required time off to look for another job. For the many times that Mr. Puche was late, left early or over extended his break for periods of time ranging anywhere from a few minutes to over an hour, permission to be absent from his work station was not obtained. Mr. Puche attributed these periods of absence to a number of factors including the fact that on occasion he would have to wait to start work until someone opened the plant doors or, the fact that for a period of time employees found it necessary to use the washroom facilities of a

nearby restaurant because the washroom facilities at the plant were either not operational or in total darkness because Mr. Ramjit had removed the light bulb.

22. Notwithstanding that there were some legitimate reasons for not attending at work in a timely fashion we find that on a number of occasions Mr. Puche was simply late without any apparent reason or explanation. The evidence makes it clear that in this regard, from Mr. Ramjit's point of view Mr. Puche was not a satisfactory employee. Nevertheless Mr. Ramjit did not discipline Mr. Puche. Although we accept that Mr. Ramjit spoke to Mr. Puche about the need for punctuality and urged him to improve his time keeping habits because others depended on him to operate the machines and supply work to the other employees, we find these discussions were of a counselling nature and were not considered by either party to be disciplinary. Mr. Ramjit never imposed any discipline and never warned Mr. Puche of any negative employment consequences if his time keeping did not improve.

23. As Mr. Ramjit had failed to address any of the safety concerns voiced by the employees at Vogue Interiors, Mr. Puche contacted the Ministry of Labour, Occupational Health and Safety Division ("M.O.L."). On the afternoon of April 2, 1990, an inspector attended at the premises. While there he spoke first with Mr. Puche. Mr. Puche showed the inspector around the premises and pointed out his various concerns. Thereafter, the inspector spoke to Mr. Ramjit. Upon completion of his inspection and prior to leaving the premises the inspector made a number of orders to comply with the OHSA including an order that certain equipment not be used until the order was complied with.

24. Mr. Ramjit was aware that the inspector had spoken to Mr. Puche. Mr. Ramjit testified that he was not aware that Mr. Puche had complained to the M.O.L. until after Mr. Puche's employment had been terminated. He stated that he only became aware of that fact because Mr. Puche himself advised Mr. Ramjit that it was he who had called the M.O.L. Mr. Ramjit testified that, because he is a member of a visible minority, and often works alongside his employees, visitors to the premises rarely consider that he is the owner of the company. He stated that typically visitors approach a white employee first and are then directed to him. It was his evidence that he assumed this had happened on this occasion and that that is why the inspector spoke to Mr. Puche first.

25. On April 2nd, Mr. Puche left work early because of his search for alternate employment. He had obtained permission to do so from Mr. Ramjit.

26. On April 3, 1990, Mr. Puche was late in attending at work. Upon commencing work however, he found a note directing him to speak with Mr. Ramjit before he started any work. When Mr. Puche went to speak with Mr. Ramjit he was advised that his employment with the company was terminated. Mr. Puche testified that he was given no reason for his termination. Mr. Ramjit testified that he advised Mr. Puche that the reason he was fired was because of his irregular time keeping. That is also the sole reason which Mr. Ramjit advances for the termination before this Board.

27. The issue we must decide is why Mr. Puche was discharged. This turns on our findings of the facts, based on our assessment of the evidence and, most importantly the credibility of the witnesses.

28. The complainant and the respondent each testified on their own behalf. As is typical of contested complaints made pursuant to section 24 of the OHSA, the evidence of each stood in direct contradiction to the evidence of the other. In assessing the credibility of these two key players, we find that each offered his evidence in a self serving manner prompted primarily by self

interest. That self interest tended to colour not only their actual recollection of the events about which they testified, but also their ability to recall events about which the other testified. Thus, for example Mr. Ramjit had no recollection of Mr. Puche ever having spoken to him about *any* of the health and safety concerns itemized in the complaint. For his part Mr. Puche testified he *always* asked permission to be absent from work or notified the company prior to his absence. The demeanour of each of these two witnesses was most unsatisfactory.

29. On balance, having regard to the usual criteria and the reasonable inferences that can be drawn from the totality of the evidence we conclude that the respondent has not met the burden of proof placed upon him by section 24(5) of the OHSA. He has not established on a balance of probabilities that he did not act contrary to section 24(1) in dismissing the complainant. We do not believe that the *sole* or *only* reason why Mr. Puche was dismissed was as stated by Mr. Ramjit. Undoubtedly, Mr. Puche had some deficiencies as an employee during his brief period of service with Vogue Interiors. These deficiencies however do not disentitle him from the protection of the OHSA. The respondent has not however convinced us that no part of the reason for the discharge was because Mr. Puche chose to exercise his rights under the OHSA. In so finding we are particularly concerned with the timing of the discharge, and the lack of any previous disciplinary response to Mr. Puche's time keeping deficiencies.

30. Mr. Puche was suddenly terminated for tardiness when he had received no previous warning that his employment was in jeopardy. That this occurred the day after a safety inspector attended at the premises and issued a number of orders under the OHSA after speaking with Mr. Puche and being shown around by Mr. Puche is, in our view, more than mere coincidence. These two factors in particular point to the fact that at least one of the reasons why Mr. Puche was terminated was because he sought the enforcement of the OHSA. Accordingly, we find that the respondent's actions constitute a violation of section 24(1) of the OHSA and were a reprisal of Mr. Puche's exercise of his rights under that Act.

31. We now turn to the issue of remedy. Mr. Puche did not seek reinstatement but asked for only an award of monetary damages. We note the evidence of both Mr. Puche and Mr. Ramjit that at the time of his termination Mr. Puche was already looking for alternate work. Mr. Puche was not happy at Vogue Interiors and intended to leave in any event. We also note that Mr. Ramjit was obviously not happy with Mr. Puche's performance. In our view, had these other matters not intervened Mr. Ramjit would ultimately have discharged Mr. Puche because of his time keeping problems as it was obvious from his testimony that he was losing his patience.

32. As was noted in *Art Shoppe*, [1988] OLRB Rep. August 729 the remedy for a violation of section 24(1) is not intended to be a windfall to employees, but rather compensation for losses suffered as a result of the respondent's violation of section 24. Having regard to all of the circumstances including Mr. Puche's brief length of employment with Vogue, his wage rate while employed at Vogue Interiors, the length of his unemployment after termination, his attempts at mitigation and the factors referred to in paragraph 31 herein we have determined that an appropriate compensatory award of damages is the amount of four thousand five hundred dollars (\$4,500.00).

33. This amount is to be paid to Mr. Puche by Mr. Ramjit together with interest calculated in accordance with the Board's Practice Note No. 13. within 14 days of receipt of this decision.

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**0225-90-R Alan Reitzel, Applicant v. The Sheet Metal Workers' International Association, the Ontario Sheet Metal Workers' Conference and the Sheet Metal Workers' International Association, Locals 30, 47, 235, 392, 397, 473, 504, 537, 539, 562, and 269, Respondents**

**Petition - Termination - Three of four employees who had signed petition to terminate union's bargaining rights were family members of the owner - Effect of existence of family relationships on voluntariness of petition discussed - Petition found to be voluntary - Vote ordered**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair, and Board Members *R. W. Pirrie* and *C. McDonald*.

**APPEARANCES:** *Michael Horan* and *Alan Reitzel* for the applicant; *J. A. Raso* and *C. Coffin* for the respondents.

**DECISION OF THE BOARD;** August 8, 1990

1. This is an application, under section 57 of the *Labour Relations Act*, for a declaration that the respondents no longer represents certain employees of Reitzel Heating and Sheet Metal Ltd. for whom they are presently the bargaining agent. Sections 57(2)(a) and 57(3) of the Act provide that:

57.- (2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

...

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as it determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

2. This application came on for hearing on July 5, 1990. A similar application with respect to employees of Reitzel Heating and Sheet Metal Ltd. represented by the Christian Labour Association of Canada (the "CLAC") in Board File No. 0184-90-R came on for hearing at the same time. That latter application was disposed of by the Board at the hearing as set out in the Board's written decision of the same date therein.

3. Having regard to the material before the Board in this application, and the agreement of the parties, the Board finds that the bargaining unit to which this application relates is all journeymen sheet metal workers and registered sheet metal apprentices in the employ of Reitzel Heating and Sheet Metal Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, excluding the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) (i.e. Board Area No. 6), save and except non-working foremen and persons above the rank of non-working foreman.

4. There is no objection to the timeliness of this application. In addition, because the application relates to the industrial, commercial and institutional (“ICI”) sector of the construction industry, it affects all affiliated bargaining agents which hold bargaining rights for journeymen sheet metal workers and registered sheet metal apprentices employed by Reitzel Heating and Sheet Metal Ltd. in the ICI sector in Ontario (see *Double S Construction*, [1988] OLRB Rep. Aug. 800 paragraphs 13 to 15 in that respect). The respondent Ontario Sheet Metal Workers’ Association (which appears to have been intended to refer to the Sheet Metal Workers’ International Association) is both an affiliated bargaining agent and a part of the employee bargaining agency designated to represent its affiliated bargaining agents in ICI bargaining in Ontario. There is no objection from the respondents with respect to the manner in which this application was styled or to the notice of it which was given to the affiliated bargaining agents. Accordingly, we find it appropriate to amend the name of the respondents *nunc pro tunc* to “The Sheet Metal Workers’ International Association, the Ontario Sheet Metal Workers’ Conference, and the Sheet Metal Workers’ International Association, Locals 30, 47, 235, 392, 397, 473, 504, 537, 539, 562, and 269”.

5. Having regard to the material before the Board, and the agreement of the parties, the Board finds that there were four employees in the bargaining unit at the time the application was made.

6. In a termination application like this one, the Board must determine the wishes of the affected employees. Section 57(3) of the Act and section 73(1) of the Board’s Rules of Procedure stipulate that evidence of employee wishes must be in writing. The legislation also stipulates that employees who have indicated that they no longer wish to be represented by a trade union must have arrived at their decision voluntarily and that the written evidence thereof (in the form of a “statement of desire”, or “petition” as it is more commonly known) be an expression of their true wishes uninfluenced by any actual or perceived involvement of their employer (see, for example, *Grove Park Lodge*, [1980] OLRB Rep. Feb. 235).

7. The statement of desire filed in support of this application was prepared by and in consultation with counsel. It contains four signatures, all of which were obtained away from any work place of the employer and outside of working hours. The applicant, Alan Reitzel, who was the sole witness to testify before the Board with respect to the origination and circulation of this statement of desire, is a journeyman sheet metal worker who has been employed by Reitzel Heating and Sheet Metal Ltd. for some 12 years. He is the son of Lou Reitzel who owns fifty per cent and is the president of the employer. J. E. Bilawski owns the other fifty per cent of the company. One of the other bargaining unit employees, Bradley Reitzel, is the applicant’s younger brother, and another is his brother-in-law. The fourth bargaining unit employee is not related to any of the other three.

8. The respondents argue that the applicant’s statement of desire is not voluntary. They submit that it is not possible to separate the interests of the applicant from those of his father and that the family influence on all of the bargaining unit employees, and particularly the sole non-family member employee, is such that the petition ought not to be found voluntary. They submit that the applicant has failed to satisfy the onus on him in that respect.

9. In *King George Hotel*. [1988] OLRB Rep. Dec. 1278, there were six employees in the bargaining unit. Of these, two were daughters of the “main owner” (his wife being the other owner) of the employer and one, the applicant, was his brother. The other three employees were completely unrelated to any owner. The two daughters lived with their parents and had worked in their business for many years. The applicant had not previously worked for his brother and did not regularly and routinely socialize with the owners. The main owner had made it clear to his daugh-

ters and brother that he didn't feel a union was necessary and that "he felt it inappropriate that he had to deal with a union". The decision in *King George Hotel, supra*, also indicates that when the respondent union had filed an unfair labour practice complaint, the applicant had been involved with his brother (the main owner) in settling it and had asked about how to "terminate" the union, which he subsequently sought to do. All signatures on the statement of desire filed in support of that application were obtained at work during regular working hours. In finding the statement of desire to be voluntary and directing a representation vote, the Board said:

10. This is a unique case which involves rather unique circumstances. All six of the employees in the bargaining unit have signed a petition, and three of them are close family members of the two owners. We note that there was no suggestion, nor did the evidence suggest, that any of the owners' relatives were hired as employees in any improper fashion. The owner Real Delage made clear to his three family members that he did not want a union to represent the employees of his business. These three relatives worked closely with the other three employees. While employers need not want a union and can certainly prefer to do business without a union, they are not free to interfere with the wishes of employees with respect to representation. When the Board looks at the individual factors the Board usually considers in trying to determine whether a particular signature is voluntary, and whether the employer has attempted to influence employee choice, most factors present here would suggest that all the signatures are involuntary.

11. Turning first to the three non-family members of the bargaining unit, we are satisfied that these three employees would likely have known of Real Delage's views with respect to the union, and together with the circumstances of their signing a petition, with the brother of the owner asking them to sign, at work during working hours, the Board is satisfied that they might well have been concerned that the owner would know whether or not they had signed. With respect to their signatures therefore, the Board is not satisfied they are voluntary.

12. However, it is a different situation with respect to the family members. *But for the close family relationship and the nature of the business, we would have found their signatures also to be involuntary.* With respect to the two daughters, the majority of the Board viewed them as being in a sense part of the owner and part of the operation of the business. They live in the same house as the owner, in a separate apartment in the basement. They have derived their livelihood from their father's different businesses for numerous years, and at least one daughter (the only daughter who testified) indicated that she helped out in unofficial capacities with this business, beyond working in the bar. Notwithstanding the majority's recognition that the two daughters would have great difficulty in these circumstances in holding a view with respect to union representation contrary to their father's, we were still satisfied that their signatures were voluntary. On all the evidence, we were satisfied that the daughters really did share their father's view with respect to union representation, that this particular business did not need nor did it benefit from the presence of a union as bargaining agent. The majority of the Board therefore concluded that their signatures were voluntary.

13. The signature of the brother is pivotal. Should the Board conclude that his signature is voluntary, the applicant will have obtained the voluntary signatures of fifty per cent of the bargaining unit and accordingly a vote would be directed. Should his signature be found to be involuntary, this application will be dismissed. The brother is admittedly not in the same position as the two daughters, in that he is not part of the family in the same sense as are the two daughters. He has not participated in family affairs, whether business or social, to anywhere near the extent of the daughters. On the other hand, even at the time of the settlement discussions concerning the unfair labour practice complaint, the applicant participated with his brother in those discussions and in effect was acting together with the business owner. It might well be that the applicant, as with the daughters, would have an exceedingly difficult time in going against the known wishes of his brother with respect to the union presence in the business. But, as with the daughters, we must ask ourselves whether his involvement in this proceeding was symptomatic of his being pressured by or perceiving he was pressured by his brother Real, in which case his signature will be found to be involuntary, or whether he does in fact share his brother's view with respect to union representation. On balance, and in the unique circumstances before us, the majority of the Board was satisfied that the applicant shared his brother's view with respect to union repre-



sentation and we find that his signature is voluntary. We therefore find that fifty per cent of the signatures are voluntary.

14. The Board was unanimously of the view that it appeared from the evidence that Real Delage might well have crossed the line with respect to permissible expression of views with respect to union representation. All employees (family or otherwise) and the employer must understand that the decision is solely for the employees to take, and a decision to be taken in confidence. Should the union win the vote, and this application be dismissed, the union will retain bargaining rights and the owners must continue to bargain with and deal with the union. Any behaviour of the employer crossing permissible lines can be the subject of a complaint or complaints pursuant to section 89 of the Act, alleging that an unfair labour practice has occurred. Through such a mechanism the Board can ensure that employees' and the union's rights are protected.

10. In *Otto's Deli*, [1980] OLRB Rep. Nov. 1673, also a termination application, the Board commented on the significance of family relationships in representation matters as follows:

20. We do not think that we should readily draw inferences from the mere existence of a family relationship. In some circumstances, relatives may reasonably be perceived as having a special relationship with the employer which could influence an employee's choice with respect to trade union representation, but we do not think that this is always the case, nor are we prepared to automatically assume that the existence of a family relationship necessarily evidences a community of interest with the employer. It may be that there is a presumption tending in that direction but we are all aware that family relationships do not always exhibit the solidarity which counsel suggests. The involvement of family members is not irrelevant, but it is not the only factor to be considered especially where, as here, the inferences to be drawn from it are unclear. Of equal significance in our view is the general atmosphere prevailing at the work place, and the impact this would likely have on employee perceptions.

In that case, the Board did dismiss the application, but not because of the close family relationship of some of the employees to either the manager or owner of the employer, both of whom had clearly indicated their opposition to the trade union.

11. There is no doubt that the existence of family relationships between bargaining unit employees and those who own or manage the employer is a factor which merits careful consideration in representation proceedings. However, as *King George Hotel*, *supra*, illustrates, it is not a factor which necessarily points in one direction and its effect will depend on the circumstances (see also *Jean Marc Joanisse*, [1983] OLRB Rep. Jan. 92; *International Beverage Dispensers and Bartenders Union Local 280*, [1981] OLRB Rep. June 690).

12. The *Labour Relations Act* provides that employees are free to decide for themselves (as a group) whether they will or will not be represented by a trade union which either seeks to or does represent them. An employee should not lightly be deprived of his/her right to participate in the processes in that respect. It certainly would be inappropriate to deprive an employee of his/her right in that respect merely on the basis of a family relationship. Rather, there must be some actual or perceived link which has a material impact on the ability of that employee, or of other employees, to express his/her, or their, true wishes in that respect. In that respect, we note that while some individuals may have difficulty in holding or expressing views which are contrary to those of their parents or other relatives, others will have little or no such difficulty.

13. In this case, the respondent did not seriously argue that the applicant is, or is perceived to be, managerial. In any event, we are satisfied on the evidence that he is not. He does no more with respect to directing or co-ordinating the work of others than journeymen sheet metal workers often do, especially in a relatively small work force.

14. The applicant does not live with his parents. He has not done so since he was married

some six years ago. He testified that he is not very close to his father and sees him only on special occasions like Christmas, Easter, some birthdays etc.. He also testified that he and his father have not often discussed business on social occasions and that they have never discussed trade unions or his father's views of them. We have no reason to disbelieve him.

15. In this case, (and unlike the situation in *King George Hotel, supra*) there is no evidence which suggests that any owner or manager of Reitzel Heating and Sheet Metal Ltd. has ever expressed or indicated any view of trade unions to any bargaining unit employee, or even what views any owner or manager might have in that respect.

16. The evidence does reveal that there were 11 or 12 employees (of which the applicant herein was the only Reitzel family member) in the bargaining unit which is the subject of this application when the respondents were certified in October, 1985, and that the bargaining unit shrunk to 3 or 4 shortly afterwards. However, there is no evidence or even suggestion that there was any impropriety in this or that there has been anything unusual or untoward in the collective bargaining relationship between the respondents and Reitzel Heating and Sheet Metal Ltd.. Nor is there any suggestion that any of the four employees in the bargaining unit for purposes of this application were hired improperly.

17. In that respect, we note also that the employees affected by this application have not undergone a sudden change of heart with respect to being represented by the respondents. Some two years ago, they approached the CLAC as a group to represent them in the ICI sector in Board Area 6. A subsequent application by the CLAC was successful and that is why the respondents no longer have ICI bargaining rights for employees of Reitzel Heating and Sheet Metal Ltd. in Board Area 6. On the evidence before us, those same four employees were also all involved in the bringing of this application.

18. There is nothing in the evidence before the Board which suggests that the applicant's desire to bring this application and his wish to no longer be represented by the respondents are anything but his own. Similarly, we find that the sole non-family bargaining unit employee has voluntarily expressed a desire to not continue to be represented by the respondents. Not only is there no evidence to suggest otherwise, but he was instrumental in the origination of both the CLAC application as aforesaid and the origination of this application.

19. It is somewhat more difficult to assess the situation with respect to the other two employees, the brother and brother-in-law of the applicant respectively. It is made more difficult because there is little evidence of the nature of their relationship with the owners and management of Reitzel. What evidence there is, however, does not suggest a close relationship which, when combined with a lack of any evidence that any owner or member of management has indicated any view of unions or of this application to them and the evidence of their involvement in the CLAC application referred to earlier and in this application, tends to suggest that they also formed their views independently and voluntarily. On balance, we so find. We note that even had we found that there was insufficient evidence to satisfy us in that respect, the other two, who we are satisfied did voluntarily sign the statement of desire, still constitute fifty per cent of the bargaining unit.

20. In the result, the Board is satisfied that not less than forty-five per cent of the employees of Reitzel Heating and Sheet Metal Ltd. in the bargaining unit described in paragraph 3, above, at the time this application was made, have voluntarily signified in writing that, as of May 30, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for ascertaining the wishes of the employees under section 57(3) of the Act, they no longer wish to be represented by the respondents in their employment relations with Reitzel Heating and Sheet Metal Ltd..

21. The Board therefore directs that a representation vote be taken of the employees of Reitzel Heating and Sheet Metal Ltd. in the bargaining unit described in paragraph 3, above. Persons employed in the bargaining unit on the date hereof who are so employed on the date the vote is taken will be eligible to vote.
  22. Voters will be asked to indicate whether or not they wish to be represented by the respondents in their employment relations with Reitzel Heating and Sheet Metal Ltd..
  23. The matter is referred to the Registrar.
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**1424-89-U Marcia Robertson, Complainant v. United Food and Commercial Workers International Union AFL-CIO, Local 114P, Respondent, v. Canada Packers Inc., Intervener**

**Duty of Fair Representation - Unfair Labour Practice - Union failing to take discharge grievance to arbitration - Dismissed employee having arguable case under collective agreement - No evidence union considered impact on complainant, union, or bargaining unit - Board finding breach of duty and ordering parties to proceed to arbitration**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair.

**APPEARANCES:** *Marcia D. Robertson* and *Charles Roach* for the complainant; *David Bloom*, *Stan Henderson* and *Tim Hosford* for the respondent; *Ann E. Burke* and *Donald Rankin* for the intervener.

**DECISION OF THE BOARD;** August 13, 1990

1. In this complaint under section 89 of the *Labour Relations Act*, the complainant alleges that the respondent trade union has breached section 68 of the Act in that it has failed to represent her fairly.
2. Section 68 provides that:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The essence of the complainant's allegation in this case is that the respondent trade union was arbitrary, within the meaning of section 68, when it refused to take her discharge grievances to arbitration.

3. The complainant began her employment with the intervener Canada Packers Inc. (the "company") at its Bramalea plant on August 23, 1988 (although a seniority list, apparently prepared by the company, which was adduced in evidence shows her seniority date to be August 22, 1988). On or about December 1, 1988, the complainant was injured. Although it appears that the company has appealed a Workers' Compensation Board determination that this injury was in the



course of her employment, the complainant did receive workers' compensation benefits with respect thereto.

4. By telegram dated January 3, 1989, Allan Penny, the company's Employee Relations Administrator at the Bramalea plant, requested the complainant to contact him *in person* with respect to her absence from work by 12:00 noon on Friday, January 6, 1989. The telegram warned that she could be dismissed if she failed to do so. I find that despite the advice of Tim Hosford, the trade union's chief steward at the Bramalea plant, that she do as the telegram requested, the complainant failed to do so. Instead, her husband left a note from the complainant's doctor with a security guard after regular office hours. However, the employer took no action in this respect and I find that it had no material effect on subsequent events.

5. By letter dated January 27, 1989, the company purported to discharge the grievor pursuant to the terms of the collective agreement between the company and the trade union effective that day as follows:

January 27, 1989

Mrs. Marcia Robertson  
15 Grand Rapids Sq.,  
Brampton, Ontario  
L6S 2H9

"Registered Mail"

Dear Mrs. Robertson:

We regret that your health has been such that you have been unable to return to work within the time limits set out in our Collective Agreement for persons absent due to illness or injury.

However, in accordance with the Collective Agreement, we have separated you from the employ of Canada Packers Inc., effective today, and your employee benefits have been terminated.

Any monies owing to you, as well as your separation certificate will be forwarded to you under separate cover.

Yours truly,

A. V. Penny  
Employee Relations Administrator

AVP/vr

6. It is clear, and it was common ground at the hearing of this complaint, that the only reason for the discharge was that the complainant had, in the company's view, exceeded her "allowable break" within the meaning of articles 12.5(d) and 16.6 of the collective agreement between the company and trade union.

7. The company did not advise the complainant or the trade union that it intended to discharge the complainant for exceeding her allowable break prior to doing so. Nor did it advise the trade union when it did discharge her. However, the complainant contacted Hosford upon being advised that she was being discharged. Hosford had had no prior experience with bargaining unit employees being discharged in similar circumstances. He seemed uncertain of the complainant's status or of what, if anything, should be done in the circumstances. He did not find it appropriate

to file a grievance at that time. Nor did he, on the evidence, seek any advice or assistance with respect to the matter. Instead, he advised the complainant to report for work when she was able.

8. The complainant reported for work on February 13, 1989. She was advised that she had been discharged and that she no longer worked there. On the same day, Hosford delivered two grievances to Penny. Penny tore up the grievances. Such a response was wholly inappropriate, particularly from someone in Penny's position. It appears however, that this was not Hosford's first such experience with Penny since he simply left and delivered new grievances the next day.

9. The grievances were processed through the stages of the grievance procedure in the collective agreement and then the trade union requested the Minister, pursuant to section 45 of the Act, to refer the grievance to a single arbitrator for adjudication. (This is sometimes referred to as expedited arbitration because grievances will often be disposed of more quickly using that procedure than by using the arbitration provisions typically found in collective agreements.) At no time did the company make any objection with respect to the timeliness of the grievances.

10. The grievances were scheduled for hearing but were adjourned on consent. Prior to coming back on for hearing, the parties met with two grievance settlement officers assigned to try to effect a settlement.

11. None of the trade union representatives employed at the Bramalea plant had had any prior experience with a bargaining unit employee being discharged for exceeding his/her allowable break. (In fact there had been two such cases, but the union was unaware of these until the course of the hearing of this complaint.) At the settlement meeting, the trade union's position with respect to the grievances was that it was inappropriate for the company to discharge an employee while she was absent from work because of a compensable injury. The trade union also asserted that no employee in similar circumstances had been discharged before and, in that respect, submitted a list of five employees who it understood had exceeded their allowable break but not been discharged. The trade union also asserted that the complainant had been discriminated against because of her disability and her colour, contrary to the provisions of the *Human Rights Code, 1981*. It does not appear that any serious consideration was given to the calculation of the length of the complainant's allowable break prior to that settlement meeting.

12. The company advised the trade union that none of the five employees whose names had been raised by it had in fact exceeded their allowable breaks (though it did not bring to the trade union's attention the two employees at the Bramalea plant who had been discharged for exceeding their allowable breaks). Although it is less than clear, it appears that some consideration was given to the calculation of allowable breaks in that context. In addition, both the company and Stan Henderson, who has been a Business Agent for the respondent trade union for 12 to 13 years and has a total of some 21 or 22 years of experience as a trade union representative, and who was involved for what was apparently the first time with the complainant's grievances, advised the complainant and the two local trade union representatives (one of whom was Hosford) from the Bramalea plant that the collective agreement had always been interpreted by the parties in the manner in which it had been applied to the complainant. Henderson concluded that the grievances could not succeed at arbitration on either an allowable break issue or a discrimination issue. He told the complainant that he didn't think it was "in the best interests of the union, the membership or the individual to proceed". Neither Henderson nor anyone else on behalf of the trade union offered any explanation as to the basis for this conclusion, either to the complainant at the time or in evidence before me. It is clear, however, that Hosford and the other local trade union representatives from the Bramalea plant deferred to Henderson in that respect and that Henderson was the effective decision maker.

13. A settlement offer, which seems to reflect the nuisance value of the grievances to the company, was made to the complainant. Despite the trade union's recommendation that she accept it, the complainant declined the offer. The trade union then advised her that it would withdraw her grievances from arbitration, although Hosford, who appeared to be less than entirely satisfied with this result, did offer to assist the complainant in any other way he could, including a complaint to the Human Rights Commission (which complaint he had already begun to pursue on her behalf).

14. There was some uncertainty with respect to which collective agreement is the relevant one for purposes of the complainant's discharge. In my view, she was discharged on January 27, 1989 and the collective agreement in effect at that time is the relevant one, not the one in effect on February 13, 1989 when she reported for work. In that respect, it appears that a collective agreement between the company and the trade union dated June 30, 1986 was treated by them as being in effect until one dated February 2, 1989 came into effect - notwithstanding that the June 30, 1986 agreement, on its face, expired on March 31, 1988. I infer from that, and from article 28 of the June 30, 1986 agreement (the duration clause), that it was in fact in full force in effect during the negotiations for what became the February 2, 1989 agreement.

15. In any event, the language of the relevant provisions is the same in both collective agreements. Articles 8, 12.5(d), 16.6, and 29 of both agreements provide that:

#### ARTICLE 8 - DISMISSAL OR SUSPENSION

If an employee is dismissed or suspended for any reason whatsoever and feels that he has been unjustly dealt with, he shall promptly notify a steward or a Union Officer who shall, if a grievance is to be filed, notify the Plant Production Manager in writing within five (5) working days of receipt of notice of dismissal or suspension by the President or Chief Steward stating the grounds of objection to the dismissal or suspension. The dismissal or suspension shall then constitute a grievance and shall be dealt with according to the grievance procedure set out in Article 7 beginning with the 3rd step of Section 7.3. If subsequently it is decided that the employee was unjustly dismissed or suspended or, except in the case of theft, that the degree of penalty was inappropriate to the offence, he shall be reinstated in his former position with all rights accrued to him under this Agreement and shall be compensated for all time lost at his regular rate of pay, or granted such lesser compensation for lost wages as may be deemed fair in the circumstances.

To ensure prompt handling of any such grievance after the date the grievance is filed, not more than five working days shall elapse under each successive step up to and including the 4th step. Following the 4th step meeting not more than fifteen working days shall elapse until the 5th step meeting is held, and if the matter is to be referred to arbitration the Union will notify the Company of its nominee to the Arbitration Board within the specified fifteen day period. The time limits referred to in this paragraph may be extended by mutual agreement between the parties.

If a Union membership meeting is held after the expiry of the specified time limits, and it is then decided to pursue a grievance to arbitration, a one month extension of the time limits will be allowed after the completion of the fifteen working days specified. In the event an employee is reinstated and should any retroactivity be involved, the Company will not be liable for any retroactive pay for the above extension.

The Company will notify the President or Chief Steward or his designated representative in writing within one working day, if an employee with seniority is dismissed or suspended. Where notification of dismissal or suspension is not given within one working day, and, if a grievance is to be filed, it may be submitted within five (5) working days of the receipt of the notice by the President or Chief Steward.

...



**12.5 When Seniority Lost.** The seniority of an employee shall be considered broken, all rights forfeited and there shall be no obligation to rehire, when he:

• • •

(d) **Allowable Breaks.** Has been out of the Company's employ in excess of allowable breaks defined below:

<u>Length of Employee's Service</u>	<u>Allowable Break</u>
Over 3 months to 6 months	Time equivalent to one-half of his length of service.
Over 6 months	Time equivalent to length of service up to two years.

An employee who returns to work within the time of an allowable break shall retain the seniority he had at the time he was laid off, but shall not accumulate additional seniority during the period of the lay-off. However, credit for days worked as a part-time or casual employee will be added to the seniority he had at the time of lay-off, after being recalled to full time employment and any intervening regular days off will also be added if such part-time or casual work occurs on or before the next regularly scheduled work day that the employee would have worked had he not been laid off.

• • •

**16.6 Absence Due to Accident or Sickness.** If an employee is absent from work, because of accident or sickness, *he shall accumulate seniority while off work*, up to the time limits corresponding to seniority as set out in Section 12.5(d), Allowable Breaks, except that an employee with two or more years' service shall accumulate seniority for a period equivalent to his length of service up to a maximum of four years, and shall be returned to the job previously held or to a job carrying a rate equal to that previously held subject to seniority providing he can perform the required work satisfactorily. If the employee would not otherwise have retained his previous job and is not placed on a job carrying an equal rate of pay, he shall, subject to seniority be placed on a job he can satisfactorily perform. Application for reinstatement after the expiry of the allowable period shall be considered on its merits.

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#### ARTICLE 29 - LOCAL INTERPRETATION AND ADMINISTRATION

All parties to this Agreement recognize and agree that in its application the *primary responsibility for interpreting and administering its provisions must rest with the Local Union and the Local Plant Management.*

Sub-titles of the provisions of this Agreement are for index purposes only and are not intended as a guide to interpretation of the Agreement.

In signing the foregoing Agreement, the parties hereto recognize that no rigid rules can of themselves secure mutual co-operation which both parties agree is essential alike to the welfare of the business and to that of employees. It is, therefore, of paramount importance to all concerned that the spirit of this Agreement be followed as faithfully as the written terms.

With this in mind, the parties hereto pledge their best endeavour to carry out the provisions of this Agreement in a spirit of goodwill, tolerance and understanding.

[emphasis added]

16. Section 68 of the Act requires that the actions of a trade union in representing the employees for whom it is the exclusive bargaining agent be free of any subjective ill will. Also, the

actions of a trade union can be arbitrary, and therefore contrary to section 68, without any ill will. The mere fact that a trade union has refused to take a grievance to arbitration does not necessarily establish a breach of the duty of fair representation imposed by section 68. In that respect, the Supreme Court of Canada, in *Canadian Merchant Service Guild v. Guy Gagnon*, (1984) 1 S.C.R. 509, reviewed the principles that apply to a trade union's duty to represent employees with respect to a grievance as follows:

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

I find this statement of principle to be a useful general guideline against which the conduct of a trade union may be measured. It is also consistent with the Board's jurisprudence in this area. In that respect, it is now trite law that a trade union is not required to take an employee's grievance to arbitration merely because the employee wants it to.

17. A review of the Board's jurisprudence reveals that honest mistakes, innocent misunderstandings, simple negligence, or errors in judgement will not *of themselves*, constitute arbitrary conduct within the meaning of section 68. Words like "implausible", "so reckless as to be unworthy of protection", "unreasonable", "capricious", "grossly negligent", and "demonstrative of a non-caring attitude" have been used to describe conduct which is arbitrary within the meaning of section 68 (see *Consumers Glass Co. Ltd.*, [1979] OLRB Rep. Sept. 861; *ITE Industries*, [1980] OLRB Rep. July 1001; *North York General Hospital*, [1982] OLRB Rep. Aug. 1190; *Seagram Corporation Ltd.*, [1982] OLRB Rep. Oct. 1571; *Cryovac, Division of W.R. Grace and Co. Ltd.*, [1983] OLRB Rep. June 886; *Smith & Stone (1982) Inc.*, [1984] OLRB Rep. Nov. 1609; *Howard J. Howes*, [1987] OLRB Rep. Jan. 55; *George Xerri*, [1987] OLRB Rep. March 444, among others). Such strong words may be applicable to the more obvious cases but may not accurately describe the entire spectrum of conduct which might be arbitrary. As the jurisprudence also illustrates, what will constitute arbitrary conduct will depend on the circumstances.

18. In that respect, complaints that a trade union has acted in a manner contrary to section 68 of the Act often relate to the manner in which the trade union has handled one or more grievances of the complainant. In such complaints, the Board does not act as an arbitrator. The Board's jurisdiction is to adjudicate the complaint under the Act and is quite different from the jurisdiction of a Board of Arbitration constituted to hear a grievance. However, none of the evidence which would be relevant to the arbitration of a grievance will also inevitably be relevant to the proper

assessment of a trade union's conduct with respect to the grievance, and, in *some* cases (see, for example, *Angelo Ritrovato*, [1986] OLRB Rep. Oct. 1401), to the assessment of the appropriate remedy where a breach of section 68 is found. Also relevant to the Board's considerations in such complaints are the importance of the particular grievance(s) to the employee, the implications of the grievance(s) for the rest of the bargaining unit and the trade union, the degree of consideration given to the grievance(s) by the trade union, and the factors, both relevant and irrelevant, considered by the trade union in deciding to not deliver a grievance or, having delivered one, to not take it to arbitration. The experience and qualifications of the trade union representatives involved has also often been cited as a factor which the Board will consider (see, for example, *Ford Motor Co. Ltd.*, [1973] OLRB Rep. Oct. 549, at paragraph 40; *Canadian Union of Public Employees Local 1000 - Ontario Hydro Employees Union* (sometimes cited as *Walter Prinesdomu*), [1975] OLRB Rep. May 444, at paragraph 26). I agree that it is appropriate to consider the experience and training of the trade union representatives involved in order to keep the matter in its proper perspective. But that does not mean that it is appropriate to apply a subjective standard in fair representation matters. The standard to be applied is an objective one. Trade unions have an obligation to fairly represent employees for whom they have bargaining rights. The inexperience and lack of training of a trade union's representatives may explain their conduct but it will not necessarily excuse it.

19. In this case, the complainant's grievances were with respect to the termination of her employment. As such they were of the utmost importance to her. Where it is possible that relief could be obtained at arbitration, a trade union which has failed to process a discharge grievance to arbitration bears the burden of accounting for its decision (*Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920; *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067; *Howard J. Howes*, *supra*).

20. It is far from clear to me that the complainant's grievances in this case were doomed to failure. It is clear that the company did not notify any representative of the trade union of the termination of the complainant's employment as it was (very) arguably obliged to do by the provisions of article 8. It also seems to me that the interpretation of the relevant provisions of the collective agreement put forward by the complainant is an arguable one; that is, that in calculating the length of an employee's allowable break for purposes of article 12.5(d) of the collective agreement, the provisions of article 16.6 contemplate that an employee absent due to accident or sickness accumulates some seniority while so absent. In that respect, article 16.6 does arguably create a different formula for employees who are absent from work because of accident or illness than for employees who are absent from work for some other reason. In addition, it is not clear to me how the collective agreements or the practice between the trade union and the company at plants other than the Bramalea and Toronto plants are relevant. On the face of the excerpts from collective agreements for plants other than Toronto and Bramalea which were provided to me by the company in that respect, the relevant provisions are not identical. Further, article 29 of the collective agreements for both the Bramalea and the Toronto plants stipulate that each collective agreement is to be interpreted and administered on a local or plant basis. This, together with evidence which suggests that the Bramalea plant tended to operate independently of the Toronto plant even when both plants were covered by a single collective agreement, also tends to suggest that the practice of the Toronto plant is arguably not relevant to the interpretation of the collective agreement which covers the Bramalea plant. If so, and if the interpretation urged by the complainant, or one similar to it, was found to be correct, the complainant's allowable break would not in fact have expired before she was discharged, and perhaps not even before she returned to work on February 13, 1989.

21. Interpretations of articles 12.5(d) and 16.6 of the collective agreement which are not favourable to the complainant were suggested to me by both counsel for the intervener and counsel



for the respondent. It is not my function to adjudicate the merits of the complainant's grievances, however. Consequently I do not think it appropriate to comment further with respect to the merits of the arguments in that respect. Suffice it to say, that I am satisfied that there is a possibility that the complainant could have obtained some relief at arbitration.

22. The complainant does not suggest that there was any ill motive for the trade union's actions. Nor is there any suggestion of any such motive in the evidence and I am satisfied that the respondent's conduct does not constitute discrimination or bad faith in its representation of the complainant. However, in my view, the respondent failed to properly address itself to the question of the interpretation of the collective agreement. Not only did the respondent's local representatives fail to do that, but they relied, however reluctantly, on the opinion of Henderson in that respect. Henderson's view was that the practice in the Toronto plant was entirely dispositive of the grievances. There is no evidence that he considered anything else in that respect. Henderson is a very experienced and knowledgeable trade union representative. Yet he completely failed to consider the company's failure to notify the union of the complainant's discharge. Whatever the merits of a position that this affected the validity of the discharge, he, and through him the trade union, completely failed to even consider it. Henderson also completely failed to consider the possibility that the practice in the Toronto plant might not be determinative or even applicable to the interpretation of articles 12.5(d) and 16.6 of the collective agreement for the Bramalea plant. As noted in paragraph 12 above, Henderson did say that he felt that it was not "in the best interests of the union, the membership or the individual to proceed" to arbitration. However, Henderson offered no explanation of what he meant by that either then or in the hearing before me, or of what he had considered in arriving at such a conclusion. For the reasons suggested in *Canadian Union of Public Employees Local 1000, supra*, it is quite appropriate, as counsel for the intervener argued, for a trade union to consider the impact on a bargaining unit or on the collective bargaining relationship in balancing between the individual and collective interests in deciding whether or not to take a grievance to arbitration. But there is no evidence that Henderson, whose comment sounds more like a standard response than a conclusion based on a proper consideration of the merits of the complainant's grievances, and through him the trade union, did any more than pay lip service to that proposition. In the absence of any evidence in that respect, I am unable to see how it would have been contrary to the interests of the complainant, or the trade union, or the trade union's membership to take the complainant's grievances to arbitration.

23. In my view, Henderson, and through him the trade union, failed to give the complainant's grievances sufficient consideration in that he failed to properly consider all relevant factors with respect thereto. I am satisfied that in failing to do so, the respondent, acted in an arbitrary manner, contrary to section 68 of the *Labour Relations Act*. In contrast, I do not find any violation of section 68 prior to the meeting at which it was determined to not take the complainant's grievances to arbitration. Hosford might have taken steps to inform himself in the face of his uncertainty, he could have dealt with the telegram situation differently, some additional contact with the company or other investigation with respect to the complainant's position may have been in order, and the grievances could have, and probably should have, been delivered earlier than they were. However, the complainant did not press any issue with respect to the telegram and herself failed to comply with its obvious instructions. Further it is not evident that any failings on Hosford's part in any respect prior to the settlement meeting had any material impact on the situation. Similarly, it is difficult to fault Hosford for deferring to Henderson's greater experience. In all the circumstances, I do not find that anything Hosford, or any other representative of the respondent trade union, did or failed to do prior to the settlement meeting amounts to a breach of section 68.

24. For the reasons given in *Savage Shoes Ltd., supra*, I do not find it appropriate to merely direct the respondent to give the complainant's grievances proper consideration. Instead, I direct

that the respondent and company proceed to arbitration with the complainant's grievances dated February 13, 1989. This does not mean that the grievances cannot be settled, but in the event that they are not, the grievances are to be arbitrated on their merits without objection to their timeliness or other procedural deficiencies which arise out of the trade union's breach of section 68 of the *Labour Relations Act* as found herein.

25. I shall remain seized of this complaint for the purposes of any dispute arising out of the interpretation or implementation of this decision, and for purposes of resolving any dispute with respect to the apportionment between the parties of any compensation to which the complainant may become entitled as a result of the settlement or arbitration of her grievances.

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**1619-89-R; 1620-89-U** United Brotherhood of Carpenters and Joiners of America, Local Union 27, Applicant v. **Romatt Custom Woodwork Inc.**, Respondent; United Brotherhood of Carpenters and Joiners of America, Local Union 27, Complainant v. **Romatt Custom Woodwork Inc.**, Respondent.

**Certification - Certification Where Act Contravened - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Employer implementing planned layoff two days early after learning about organizing campaign - Employees would reasonably perceive events as connected - Union filing cards for about thirty percent of bargaining unit - No reason to discount union support among laid off employees - Employees on temporary layoff having ongoing interest or connection with workplace - Certificate issuing**

**BEFORE:** *M. A. Nairn*, Vice-Chair, and Board Members *W. Gibson* and *H. Kobryn*.

**APPEARANCES:** *Brian Sheehan*, *Conrada Guerrero* and *Ron Balkissoon* for the applicant/complainant; *Donna Gallant* and *Matt De Monte* for the respondent.

**DECISION OF THE BOARD;** August 9, 1990

1. Board File No. 1619-89-R is an application for certification which makes a request for section 8 relief. Board File No. 1620-89-U is a related section 89 complaint alleging that the respondent has violated sections 64, 66 and 70 of the *Labour Relations Act* (the "Act").

2. The complaint alleges that the respondent laid off nineteen employees on September 27, 1989 in violation of the Act. There is a related dispute as to whether two more employees were laid off or had quit their employment. The trade union (the "applicant") states that as a result of the lay-off the true wishes of the employees in the certification application are not able to be ascertained and asks the panel to apply section 8 and certify the applicant.

3. The respondent (the "company") concedes that it violated the Act in laying off employees on September 27, 1989 upon learning of the union's organizing campaign. However the respondent asserts that the lay-off was planned to occur on September 29, 1989 and argues that this is not an appropriate case for the Board to apply section 8, although it concedes that other remedies may well flow from the respondent's admitted violation of the Act.

4. Much of the evidence that the panel heard throughout the hearing was directed at the

issue of whether or not a lay-off was in fact planned for the 29th of September and to the issue of who would be subject to any lay-off.

5. The respondent is a manufacturer of cabinet doors used primarily in the new housing construction industry. The company has been operating since the middle of 1982. Over the years it grew quite quickly until in May of 1989 it employed over ninety people. However, over the summer of 1989 the company experienced a marked decline in orders. We heard evidence from the respondent's accountant, its controller, the majority owner Mr. De Monte, and received documentary information concerning the company's financial position. Although the company does not appear to have been at risk as an ongoing operation, we are satisfied that there was considerable need for reassessing its operations. Not unlike many small companies which grow quickly, the respondent lacked adequate financing, maintained a high inventory of finished product, and high accounts receivable. As a consequence, the company was subject to ongoing cash flow problems and in that sense was highly leveraged. So long as the company continued to expand its sales this financial position may not have affected the company's operations. However, in the summer of 1989 a number of factors conspired to reduce sales.

6. In July and August of 1989 orders dropped by almost one half from the previous months experience. In addition, the company received cancellations of orders already placed. One large customer cancelled orders as a result of its own production slow down and another customer went out of business. In June the respondent had found it necessary to issue promissory notes to two suppliers for amounts totalling in excess of \$225,000.00.

7. The company, and more particularly Matt De Monte the majority owner, had not dealt with a downturn in business before. It became apparent to him over the summer that with reduced orders he would not be in a position to employ the same number of employees. Over the summer Mr. De Monte was hopeful that this was a very temporary state of affairs. However it is also apparent that his optimism was not shared by either his accountant or his controller.

8. In early September 1989 Mr. De Monte met with his foreman Mr. Diep and together they went through the plant, assessing each area's work load and work force in anticipation of a lay-off. The controller, Ms. Proto, had provided Mr. De Monte with a computerized list of employees for his use at this time. Mention of a lay-off was made to Mr. Scarimbolo, Mr. De Monte's partner.

9. Mr. De Monte planned to lay-off employees on September 29, 1989. It marked both the end of a month and it was a pay day. Although he suggested that it would not have been possible to implement the lay-off in time for the first pay period in September, it is apparent that when it did in fact occur it was implemented in one day.

10. On September 26, 1989, at the end of the day, Mr. De Monte received a copy of a union leaflet announcing a union meeting for the evening of September 27 at 5:00 p.m. and inviting all Romatt employees to attend. Upon receiving that document and learning of the union's organizing campaign in the workplace, Mr. De Monte implemented the lay-off as of the next day September 27, 1989. We heard considerable evidence concerning the creation of the Records of Employment for the affected employees. It is clear that twenty-five percent of the employees in the proposed bargaining unit were provided with notice of lay-off at the end of the day of September 27, immediately prior to the convening of the union meeting. The respondent concedes that it committed an unfair labour practice in violation of the Act in implementing the lay-off on September 27th.

11. The real question in this case is what remedy ought to flow in the overall circumstances



as a result of this admitted violation of the Act. On balance, we are satisfied that a lay-off was in fact planned. We are further prepared to accept Mr. De Monte's testimony that it was planned for September 29th. Although that date was not disclosed to anyone prior to the actual occurrence of the lay-off, Mr. De Monte gave his evidence in a straightforward and credible manner, and notwithstanding a lengthy cross-examination. It is also consistent with the other evidence concerning the financial position of the company and the slow down in orders. Although the orders were reduced over the summer, the effect on the work load would not take place until some time in September. That fact is borne out upon a review of the amount of hours of overtime worked over the summer and into September 1989.

12. The union argued that the fact that Mr. Scarimbolo continued to hire new employees in September was evidence of no intention to lay-off employees. Although the evidence is certainly consistent with a degree of disorganization and lack of communication between the two partners, we are satisfied that it is Mr. De Monte who makes the effective business decisions for the respondent, and that this evidence is not inconsistent with the conclusion that the lay-off was planned. It is also clear from Ms. Proto's evidence that she anticipated a lay-off.

13. The union sought to rely on an apparent inconsistency in the evidence of Ms. Proto that she was not aware of the actual date of the lay-off until the 27th. Mr. De Monte testified that Ms. Proto was aware of the September 29th date at the time they first discussed the preparation of Records of Employment. The union also relied on the fact that there was no apparent preparation for the effects of the lay-off. However it is not clear that any real reorganization of work was required, simply that fewer machines would be operating. The evidence does not disclose any difficulties in the performance of work on September 28th, the day following the lay-off. The union also sought to rely on Mr. De Monte's failure to give notice of lay-off to employees as evidence that no lay-off was planned for the 29th. However Mr. De Monte's understanding of the provision of notice was that it was required when employees were fired from employment but he did not understand it to be required in the case of a temporary lay-off. He did understand that he was required to complete a Record of Employment for purposes of unemployment insurance. Overall we are satisfied that this evidence does not detract from the conclusion that the lay-off was planned for September 29th.

14. It was the position of the respondent that Ricardo Bravo and Alejandro Irusta were not laid-off in violation of the Act but that they had in fact both quit their employment. The union disputes this. Mr. Bravo testified that he had permission to be absent from work. The absenteeism sheets provided by the respondent confirm that Mr. Bravo was absent from work on Tuesday, September 26, 1989. Mr. Bravo returned the Monday following the lay-off and received a copy of his Record of Employment from Mr. Scarimbolo who told him that he had been laid off. The Record of Employment received by Mr. Bravo at that time indicates a shortage of work as the reason for the severance from employment. Mr. Scarimbolo confirms that Mr. Bravo had been absent for some days and that he spoke with him at the time he provided Mr. Bravo with a Record of Employment "like any one else". The only evidence suggesting that Mr. Bravo quit his employment is from Ms. Mendez who testified she called on Monday, September 24th because he was absent and on Tuesday was informed by Mr. Bravo that he was going to quit. Neither of these assertions is supported by the daily absentee sheets which do not indicate that Mr. Bravo was absent on the Monday (which was September 25th). The reason given for the absence on Tuesday is "don't know". Ms. Mendez testified that she told Mr. Scarimbolo of Mr. Bravo's intention to quit yet Mr. Scarimbolo told us that it was Mr. Bravo who told him of his intention to quit on the Monday. On balance we are not satisfied that Mr. Bravo evidenced an intention to quit his employment but rather that he was laid-off on September 27th in violation of the Act.

15. Mr. Irusta testified that he was absent from work on September 27th due to illness. On September 28th he spoke with Mr. De Monte who informed him that he had been laid-off. Ms. Mendez testified that Mr. Irusta's wife had called on September 26th to inform her that Mr. Irusta had quit. Although we did not hear evidence from Mr. Irusta's wife denying this, we also did not hear any evidence from Mr. De Monte denying his conversation with Mr. Irusta on the 28th to the effect that he had been laid-off. A Record of Employment, indicating a shortage of work as the reason for separation, was produced and it was Mr. Scarimbolo's evidence that he believed Mr. Irusta to be employed on the 27th. On balance we are satisfied that Mr. Irusta did not quit his employment but was laid-off in violation of the Act.

16. In applying section 8 of the Act three things must be shown. Firstly, the employer must have contravened the Act. In this case the employer violated sections 64, 66 and 70 of the Act in laying off twenty-one employees on September 27, 1989 as a consequence of learning of the union's organizing campaign.

17. The second factor is that as a result of the contravention of the Act the true wishes of the employees are not likely to be ascertained. In this case, in direct response to the fact of the trade union in the workplace, the employer laid off twenty-five percent of the employees in the proposed bargaining unit. There was no advance notice to any of the employees concerning the lay-off and notwithstanding that we have found that the respondent planned a lay-off for September 29th in any event, that fact remained unknown to the employees. The lay-off occurred moments prior to the union convening its first general meeting of the employees. There can be no doubt that the effect of such a lay-off would be to send a clear message to employees that the fact of union representation would seriously jeopardize their job security.

18. We heard considerable evidence about who had been laid off and on what basis. It is clear that the decision who to lay-off was solely Mr. De Monte's. The applicant cross-examined Mr. De Monte extensively reviewing with him the fact that Mr. Scarimbolo had hired certain new employees in August and September of 1989, and that many of the individuals laid off were Spanish speaking. This evidence was also directed of course to the issue of whether a lay-off was in fact planned at all.

19. The respondent submitted in evidence a list of employees by their work area including their date of hire and job classification. Although the applicant argued that the document was self-serving in that it had been prepared for the purposes of the hearing it did not seriously challenge its contents. We have reviewed that document, compared employees' dates of hire with the list of laid off employees. We have compared the list of employees actually laid off with Exhibit 7, the preliminary list of people being considered for lay-off. We have considered the type of work being performed by each laid-off employee including any *viva voce* evidence we heard on that point. We are satisfied that employees were chosen for lay-off based primarily on their seniority in their area. Any exceptions to the application of a principle of seniority were explained by Mr. De Monte and we accept his explanation regarding the particular skills of the individuals. It is also apparent that the individuals who were laid-off were working for the most part in jobs requiring less skill. Again, to the extent that any skilled worker was laid off it was consistent with their security and/or the production requirements of the respondent.

20. Although we have found that the individuals who were laid off were chosen primarily on the basis of seniority or on the basis of their particular skills and not because they were union supporters, that fact may well not have been apparent to the employees. The union's organizing campaign had initially been directed at those employees who were Spanish-speaking. The majority of the employees laid-off fall into this category. In determining whether the true wishes of the

employees are not likely to be ascertained we must have regard to the reasonable perceptions of the employees. The timing and extent of the lay-off and the individuals actually laid-off, in this case coming immediately prior to the union's first general meeting and with no prior knowledge to the employees, in our view could only send one message to the employees. In such circumstances a vote would not likely disclose whether the employees wish to be represented by a trade union but rather whether they wished to maintain some job security.

21. The third factor is assessing whether or not the trade union has membership support adequate for the purposes of collective bargaining. The respondent argued that to the extent that union supporters were laid off, and that the lay-off would have taken place in any event, any support shown by those individuals cannot be taken into account for purposes of section 8. The respondent further argued that whatever chilling effect occurred following the lay-off was a result of a lack of interest and not as a result of the employer's conduct.

22. The union's organizing campaign began in August with the arrival of Mr. Guerrero. Mr. Guerrero is employed by the applicant as an organizer and he is fluent in more than one language including Spanish. To the extent that Mr. Balkissoon may have visited a nearby donut shop in July we are satisfied that at best it could be described as initial overtures. The respondent's work force is comprised of individuals whose first language is other than English. The union decided to seek the support of the Spanish-speaking population first and to then approach other employees as this had been a successful organizing strategy for them in another campaign. The first organizing meeting held was August 17th at which time six cards were signed. Between August 17th and August 31st, another sixteen cards were signed. There were no meetings held during this period. Mr. Guerrero met with some Vietnamese and Chinese speaking employees with the assistance of a translator on September 7th and also had the assistance of a Persian translator for conversations on September 14th. Between September 1 and the lay-off three cards were signed. The respondent points to this as evidence that the union had canvassed all the available support for its campaign. However, the amount of time that passed was not particularly significant given the apparent difficulties in communication. The union organized the first general meeting for all employees to discuss the union for September 27th. The union arranged to have translation services available at that meeting. Two cards were signed on September 29th. The union filed in its application membership evidence of approximately thirty percent of the proposed bargaining unit.

23. In assessing the adequacy of membership support we note the approach set out in *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Jan. 60:

14. ...

In approaching its discretion to grant certification under [section 8] of the Act, the Board must make some prognosis as to the future viability of bargaining. In so doing it does not necessarily view the membership strength which the applicant has on the date of certification as a static and immutable figure. Where the evidence establishes that a workplace has been subjected to the chilling effect of unfair labour practices that tend to suppress any expression of pro-union sentiment, it is not unreasonable to expect that the granting of a Board's certificate, with or without the assistance of other remedies under the *Labour Relations Act*, will in some degree restore the legitimacy of the trade union in the eyes of the employees. The Board therefore takes into account the potential for union support to grow among employees who beforehand might have been afraid to associate themselves with the union. With the granting of a certificate, assuming that all unfair labour practices will end, there is little reason to doubt that the union's base of support will grow and that more and more employees will come forward to participate in the endeavours of their bargaining agent. determining whether a union has support adequate for collective bargaining purposes within the meaning of [section 8] of the Act, the Board's concern is whether there is a



number of employees, sufficiently representative of the employees in the bargaining unit, with the ability to negotiate with their employer on the content of a collective agreement. In this regard, bargaining ability is to be distinguished from bargaining power. The question is not whether they can amount to successful strike, or whether they will eventually realize substantial gains at the bargaining table. Rather, it is whether they have the core of support sufficient to negotiate with the employer. A [section 8] certificate, like any certificate, is only a beginning and need not be seen as anything more.

24. Similarly, the Board's comments in *Trulite Industries Limited*, [1983] OLRB Rep. May 821 are instructive:

22. We have found that the respondent has contravened the Act; and if ever there was a case where the true wishes of the employees are not likely to be ascertained by the conventional means now available, this appears to be it. But does the applicant have "membership support adequate for the purposes of collective bargaining"? This phrase was added to section 8 (then section 7(a)) in 1975 in place of the requirement that the union have the support of more than fifty per cent of the employees in the bargaining unit. It is clear, therefore, that the phrase "membership support adequate for collective bargaining" is not simply a reference to majority support. Even more striking is the removal of the reference to a representation vote which appeared in the statutory predecessor of section 8. By doing so, the Legislature appears to have contemplated the possible application of the new section 8, even where the applicant's membership support falls below the minimum level required for entitlement to a representation vote (see *Lorain Products*, [1977] OLRB Rep. Nov. 734). In other words, the section can now apply to situations where the employer's illegal response is so massive and so early as to prevent a trade union from ever attaining the level of support needed for a representation vote.

23. That is what has happened here. Had it not been for the unlawful interference of the respondent, the applicant might well have garnered at least the thirty-five per cent support necessary for the taking of a pre-hearing representation vote. As it is, the applicant obtained the support of about ten employees on March 22nd - 23rd, but none after the captive audience speech of March 23rd, and the discharges of March 24th. The fact that the union gained the support of about 30% of the potential unit and that a number of employees were interested enough to make their way to the union hall to sign cards lends credence to the evidence of the applicant's witnesses that there was considerable interest in trade union representation, which might have matured had it not been stifled.

24. The competing policy considerations which underlie section 8, are aptly set out by the British Columbia Labour Relations Board in commenting on a similar provision in its own statute. In *International Brotherhood of Boilermakers, Lodge 359 and Forano Limited* (1974) 1 Can. L.R.B.R. 13, the board observed at page 20:

...Certification without a vote...creates a real disincentive to the use of [intimidatory] kinds of tactics. It does so by depriving the offender of the fruits of its unlawful conduct.... However, that is just part of the case for this remedy, because the party primarily affected by the certificate is the employees. We can assume that the Legislature did not want to visit the sins of the employer or the union on the innocent employees, who, after all, are supposed to be the beneficiaries of this freedom of choice about collective bargaining. Accordingly, the remedy is to be used where one cannot feasibly determine the true wishes of the employees through the normal means...I think everyone is aware of the risks involved in that kind of certification. In some cases, the employees may have foisted upon them a bargaining representative which they really don't want. Undoubtedly, the remedy must be carefully used...

25. As the above comments indicate, the wishes of the employees are always the Board's primary concern, and the remedy is not meant to be punitive; moreover, where support is not really there, the Board would not be placing the union in an enviable position by granting a certificate. Without the support of the employees the union would have a difficult time negotiating a collective agreement, and it would ultimately face the prospect of a termination application. On the other hand, the Board must not hesitate to consider the provisions of section 8 when it is

the employer's own misconduct that impairs the Board's ability to ascertain with more certainty what the wishes of the employees really are. As the British Columbia Board went on to say:

...The Board must not be afraid to use it [the certification remedy] when it appears appropriate. The Legislature conferred it for the very good reason that there is another equally serious risk to employee freedom. The majority in a unit may really want collective bargaining but have been intimidated from choosing it openly. The only way they will get it, is for the Board to certify the union...

• • • •

27. In our view, the applicant has demonstrated a substantial and workable "core" of support for the union, and, on the evidence before the Board, this "core" must be regarded as a basic minimum of the trade union's support since there were other individuals who expressed interest and who might be moved to support the applicant once the opportunity for a free expression of views has been established. There is, in addition, no evidence in the present case to suggest that the union's campaign was anywhere close to being "spent" at the point when the respondent employer intervened. Accordingly, on the basis of the evidence before it, the Board finds that the respondent has contravened the Act in such manner that the true wishes of its employees are not now likely to be ascertained and that the applicant has membership support adequate for collective bargaining. That the applicant is therefore entitled to be certified pursuant to section 8 of the Act:....

25. The fact that employees would have been laid off on September 29th does not detract from the union's support in the workplace. As the respondent acknowledged it hoped that the lay-off would be of a temporary nature and that employees would be able to be recalled. It cannot be said that employees have no ongoing interest or connection with the workplace such that their support should be discounted.

26. While we are not unsympathetic to the respondent's concerns arising from the slow down in work over the summer of 1989 that concern cannot condone an interference with employees' statutory rights. As the Board said in *Trulite Industries Limited*, *supra*:

19. Certification without a vote under section 8 was designed as a deterrent to illegal employer interference in union organizing campaigns, and a device to provide a meaningful remedy in those cases where the employer's interference undermines his employees' statutory rights, and, in addition, precludes the Board from undertaking its usual determination of employee wishes through a representation vote or an assessment of the union's membership evidence. In other words, section 8 is a kind of "second best" solution, to be applied where the employer's misconduct not only frustrates the union's organizing drive, but also impairs the Board's ability to ascertain whether the majority of the employees do or do not wish to be represented by a union....

20. There is no doubt that the respondent's conduct in this case involves serious contraventions of the Act even though, to some extent, its actions are understandable and, in the Board's experience not all that unusual in today's troubled times. Peter Alexander testified that he and his partner were deeply concerned about the prospect of dealing with a union, and like many other small businesses in recent years, they have been experiencing severe financial difficulties. A collective bargaining relationship was regarded as but one more burden which they feared would destroy their business. Alexander was also convinced that support for the union was restricted to a small vocal minority of new employees whose presence had disrupted the "family" atmosphere which he had sought to maintain with the employees since the company was formed in 1975, hence his decision to fire the "agitators". Indeed, Alexander candidly admits that his actions were improper and an overreaction attributable to the financial pressures which he had been under for some months; and we have no reason to doubt the reality of those pressures. The four discharged employees were eventually reinstated pursuant to a without prejudice settlement of their section 89 complaint.

21. The scenario present in this case is not a new one, and the Board is not unsympathetic to the

situation of the small businessman pressed by creditors and high interest rates, and anxious about the very survival of his business. Having no direct experience with collective bargaining and fearing its consequences, such employers sometimes do overreact and interfere with their employees' statutory rights - particularly where, as here, they act precipitately and without professional advice. But our appreciation of the context does not obscure the gravity of what has happened here. In his remarks on March 23rd, Mr. McInnes told the employees that their jobs would be jeopardized if they opted for trade union representation, that the plant would close, that the business would be "killed", and that certain benefits or opportunities then in place (e.g., overtime) would no longer be available. The very next day four employees identified as supporters of the union were summoned before the co-owner of the company and summarily discharged. It is hardly surprising that, thereafter, there was little enthusiasm or support for the union even among persons who had previously expressed considerable interest. The employer has indicated in the most graphic way possible that employees who support the union do so at the risk of their jobs. We do not think this "message" is likely to be forgotten easily.

27. Therefore, we find that the employer violated sections 64, 66 and 70 of the Act in laying off employees on September 27th. The respondent is ordered to pay to those employees laid-off including Mr. Bravo and Mr. Irusta an amount equivalent to what they would have earned on September 28 and September 29, 1989 had they not been laid-off on September 27th. The panel will remain seized on the matter of compensation should the parties be unable to resolve it. Further, we direct that the respondent post in the workplace in conspicuous places the notice attached as Appendix A. The Board directs the parties to meet with a Labour Relations Officer for the purposes of attempting to resolve the nature of recall rights of the employees affected by the lay-off. Failing such resolution, the matter may be dealt with before the panel.

28. Further, we also find that this is an appropriate case to apply section 8 and certify the applicant.

29. We find that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

30. Having regard to the agreement of the parties, we further find that all employees of the respondent in the Regional Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

31. Having regard to our finding with respect to section 8 of the Act, we hereby certify the applicant for the above-noted bargaining unit.

32. A certificate will issue.

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## Appendix "A"

## Labour Relations Act

# NOTICE TO EMPLOYEES

## Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD. AFTER A HEARING IN WHICH THE TRADE UNION PARTICIPATED, THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT BY LAYING-OFF EMPLOYEES ON SEPTEMBER 27, 1989. THE ONTARIO LABOUR RELATIONS BOARD ALSO FOUND THAT AS A RESULT OF THE VIOLATION OF THE LABOUR RELATIONS ACT, THE TRUE WISHES OF THE EMPLOYEES WOULD NOT LIKELY BE ASCERTAINED IN A VOTE AND THEREFORE CERTIFIED THE TRADE UNION, THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 27 TO REPRESENT THE EMPLOYEES IN THE BARGAINING UNIT DESCRIBED IN THE BOARD'S DECISION.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE  
LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT WE  
WILL NOT DO ANYTHING THAT INTERFERES WITH  
THESE RIGHTS:

ROMATT CUSTOM WOODWORK INC.

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PER: (AUTHORIZED REPRESENTATIVE)

**This is an official notice of the Board and must not be removed or defaced.**

**This notice must remain posted for 60 consecutive working days.**

DATED this 9TH day of AUGUST 1990 .

**1113-90-R** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. **Ventra Group Inc.**, Respondent v. Group of Employees, Objectors

**Certification - Practice and procedure - Board reviewing factors for consideration in determining whether to extend terminal date - Board declining to extend terminal date - Certificate issuing**

**BEFORE:** *Robert D. Howe*, Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballentine*.

**APPEARANCES:** *Clare Meneghini*, *D. Flynn* and *Cheryl Barnier* for the applicant; *Patrick F. Milloy* and *Mike Kutzscher* for the respondent; *Jim Marriott* for the objectors.

**DECISION OF THE BOARD;** August 24, 1990

1. The name of the respondent is amended to read: "Ventra Group Inc."
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in its Ventra Manufacturing Division in Chatham, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and employees in bargaining units for which any trade union held bargaining rights as of July 23, 1990, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. For purposes of clarity, the Board notes the agreement of the parties that no one employed at the respondent's 285 Inshes Avenue plant falls within the scope of this bargaining unit.
6. After hearing and recessing to consider the submissions of the parties concerning a request by the objectors' representative that the Board extend the terminal date so as to render timely the petitions which he belatedly filed on August 16, 1990, and August 20, 1990, the Board made the following unanimous oral ruling:

As indicated in *Kilean Lodge Incorporated*, [1977] OLRB Rep. April 240, at paragraph 9, the factors which the Board generally takes into account in deciding whether or not to extend the terminal date in a certification application include:

1. The number of days the notice was posted.
2. The manner in which it was posted, including the frequency of locations of posting on the respondent's premises and whether it was sent to employees individually by mail.
3. The number of employees in the bargaining unit and the frequency of their presence on the premises during the time of posting, having particular regard to shifts and days off.
4. Whether any delay in posting is attributable to the employer.

5. Whether the request for an extension is made by the employer alone or by a group of employees....

In the instant case two copies of the (Form 6) "green sheet" and two copies of the notice entitled "Notice to Employees" were posted in the plant at 11:15 a.m. on Wednesday, August 1, 1990. Thus, it was available for reading by the respondent's relatively small work force of approximately twenty employees for a full two and a half working days before the summer shutdown which commenced the following week. Moreover, even during the shutdown there were still seven employees at work, and it was open to them and to the employees who were not at work that week to file with the Board one or more statements of desire or petitions in opposition to the application on or before the terminal date, which was Thursday August 9, 1990. Thus, the employees had over a week to file statements of desire in a timely fashion.

Having regard to all of the circumstances, we are not prepared to extend the terminal date fixed in this matter. Moreover, even if we were to extend the terminal date to August 20, 1990 so as to render both petitions timely, and they were both proven to be entirely voluntary, they would not raise doubt concerning the continued support for certification of the applicant by a sufficient number of employees who also signed membership cards that the Board would exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken; i.e., there is insufficient overlap to make the petitions numerically relevant.

Since there are no circumstances present in this case which warrant the exercise of the Board's discretion to direct that a representation vote be conducted, and since the Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees in the bargaining unit at the time the application was made were members of the applicant on August 9, 1990, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the Act, subject to the Board's usual second check of the membership evidence, a certificate will issue to the applicant in this matter.

7. In accordance with that ruling, a certificate will issue to the applicant for the bargaining unit described above.

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**2740-89-FC National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada), Applicant v. Venture Industries Canada, Ltd., Respondent**

**First Contract Arbitration - Employer insisting on company philosophy clause with anti-union origin - Employer insisting union agree not to prohibit subcontracting in agreements with other employers - Employer adopting unreasonable bargaining position - First contract arbitration directed**

**BEFORE:** K. G. O'Neil, Vice-Chair, and Board Members R. W. Pirrie and C. McDonald.

**APPEARANCES:** Daniel Harris, Leo Rustin and Joey Gander and others for the applicant; Patrick Milloy and others for the respondent.

**DECISION OF THE BOARD;** August 9, 1990

1. This is an application for settlement of a first collective agreement by arbitration, pursuant to section 40a of the Act.



Adjournment Request

2. This matter first came on for hearing on February 19, 1990. At that time the employer objected to filing a collective agreement that it was prepared to execute pursuant to Practice Note 18. As a result of a ruling by the Board, differently constituted, the respondent filed a collective agreement on February 21, 1990. The next two hearing days were spent in an attempt to settle the matter. On Thursday, February 22, the matter was adjourned to continue on dates set on consent, being February 26, 27 and 28, the following Monday through Wednesday. The parties agreed that the time limits in section 40a would start running again on February 26, the first actual day of hearing.

3. When this panel of the Board convened the hearing on February 26, employer counsel asked for an adjournment on the basis that his client was engaged in multi-million dollar negotiations in the United States. He submitted that as his client had only learned that he would be needed in this other matter after the agreement the previous Thursday to proceed on Monday, February 26, an adjournment was in order, despite the consent to the dates scheduled. The Board did not allow the adjournment as the facts could not be considered exceptional circumstances beyond the party's control, nor to be advisable in the interests of justice, pursuant to section 82(1) of the Board's Rules of Procedure. If the Board were to adjourn whenever a party had other business which it chooses to deal with on the date of a hearing, no party would have any reasonable prospect of a hearing proceeding expeditiously. The maxim "labour relations delayed is labour relations denied" is ever more applicable in the context of a section 40a application, intended by the Legislature to proceed within very short time lines.

The Application for Direction of Settlement of a First Collective Agreement by Arbitration

4. On March 27, 1990, the Board endorsed the record and the parties were advised that the application was granted, with reasons to follow. In the interim between the hearing and our decision, a termination application was filed. In the Board's decision dated May 31, 1990, we decided to continue with this application, and dismissed the termination application. We now provide our reasons for the original direction to arbitrate.

5. The statutory provisions relevant to our decision are as follows:

40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report on a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

6. The respondent is a wholly owned subsidiary of Venture Industries, an American corporation based in Fraser, Michigan. An application for certification concerning its Wallaceburg auto parts painting plant was filed on March 25, 1988 by the applicant union. It was certified to represent the relevant bargaining unit on March 15, 1989 after fifteen days of hearing.

7. Notice to bargain was given by the union on March 23, 1989. A request to bargain was made by phone shortly thereafter, and again in writing on April 19, 1989. There were telephone conversations between April 26 and May 16 between the representatives of the parties concerning setting up the first meeting which did not result in a date being set. A request for conciliation was made on May 19, 1989. On or about May 23, 1989 the date of June 27, 1989 was set as the first bargaining meeting between the parties. The union alleges that the conduct of the respondent in being slow to respond to the requests to bargain and failure to agree to meet until after the request for conciliation were the first in a series of actions that should be characterized as a failure to make reasonable and expeditious efforts to conclude a collective agreement. Further, the union alleges that, having given the company the dates its chief negotiator was *not* available, the company chose those dates as the first meeting dates it proposed on May 16, 1989. The company says this was a misunderstanding. On the more general question of setting up a meeting, it says both parties had busy schedules and the meeting was set up in the time period in which the union was offering dates. They cite the union's delay in bringing the complaint after the October 23rd meeting as proof that expedition was not of first importance to the union. Further allegations of failure to make reasonable and expeditious efforts to conclude a collective agreement included the union's assertion that the company's practices at the table, including tabling a fresh document at each meeting, were designed to protract negotiations and impede progress. The company replies that it was attempting to facilitate the process and keep track of progress.

8. On June 7, 1989 a wage increase was given to the members of the bargaining unit without, the union says, its consent. The company says that it was relying on a blanket consent given the year earlier when a one-week bonus was given. The union asks us to find that this was a breach of the freeze provisions, and in the context of the provisions of section 40a, a failure to recognize the bargaining authority of the union. The intended message, in the union's view, was that the company would give unilateral raises, and that the union was essentially irrelevant. Additionally it argues that Messrs. Lowe and Torakis had no authority to conclude a collective agreement. It says that Mr. Winget, the owner of the parent company was the only one with that authority.

9. The applicant union also asked the Board to have regard to the company's conduct during the certification process and the actions complained of in a related section 89 complaint in considering whether the preconditions for direction in section 40a existed. The section 89 complaint relates to lay-offs which the union alleges were not necessary for valid business reasons and were motivated by a desire to attack the union during the certification hearings. The company says that Venture Canada lost certain work because it was unable to handle it at a competitive cost. Venture Industries, the American parent therefore assigned the work elsewhere and Venture Canada laid people off. Further lay-offs were justified by the company as downsizing the plant to the point where it could be more productive.

10. The first meeting between the parties took place on June 27, 1989. A conciliation meeting, at which no bargaining took place, occurred on July 21, 1989. Five further negotiation sessions took place, the last one on October 23, 1989. An additional date had been set for July 28, but was cancelled to allow the union to review the company's proposals. At the last meeting the union asked that negotiations be "adjourned", and said that it would advise the company whether it would strike, seek arbitration of the contract, or return to the bargaining table. This application was filed on February 8, 1990. No further negotiations occurred in the interim. No collective agree-

ment has been signed. At the point at which bargaining stopped in October, agreement had been indicated on some items but nothing had been "signed off". The parties were in dispute as to whether the items agreed to verbally or in the company's minutes were firm or subject to revision until signed off. The union says that bargaining has been unsuccessful because of the respondent's conduct. The company says that real bargaining was just about to begin when the union broke off.

11. Detailed evidence was given about the negotiating sessions by Leo Rustin, National Representative and Chief Negotiator for the applicant, and by Michael Torakis, Ted Lowe and Michael Pavlovic, the three members of the company's negotiating team. Messrs. Torakis and Lowe, who are based in Fraser, Michigan, were the company's spokesmen during negotiations. Mr. Torakis is Vice-President, Finance and Administration, of the respondent's American parent and is responsible for personnel policies at Venture Canada. Mr. Lowe is the parent Company's Vice-President for Quality Improvement and Corporate Planning. He developed the company's proposals using the company's personnel handbook, collective agreements which reflected "contemporary management labour agreements", some points from the document which the union had previously tabled and his own thoughts. Mr. Pavlovic is the Plant Manager of Venture Canada; his is the most senior position in Wallaceburg. He reports to Messrs. Torakis and Lowe in their areas of responsibility as well as to others in the parent company. His role at the bargaining table was to advise Lowe and Torakis on the day-to-day operation of the plant. He was not involved in developing the bargaining proposals, nor did he know who had been. The company also called evidence from two former members of the union's negotiating team and from their Quality Improvement Process Administration. The union called in reply Ms. Gander, an employee member of the union's negotiation team. We do not propose to set out the evidence in the detail in which we heard and considered it (there were six days of hearing), but will refer to it as necessary in our findings of fact below.

12. In deciding that the negotiations in the application before us were unsuccessful, we are mindful that there is no formula for deciding whether a process has been unsuccessful. By necessity, the decision entails making inferences about the future on a balance of probabilities from the prior history of the bargaining. An examination of the reasons set forth for the alleged lack of success will often assist greatly in the determination of whether or not the process has been unsuccessful.

13. In *Nepean Roof Truss*, [1986] OLRB Rep. July 1005 the bargaining process was found to be unsuccessful where the union had been categorically informed by the company that it would not recede from a 3 year term or the merit clause (instead of seniority) and the union had compromised on most major matters. The company had taken the position that the union should have continued bargaining, but the Board held that where attempts to continue bargaining would be obviously meaningless, the applicant should not be penalized for applying under section 40a. In *Alma College*, [1987] OLRB Rep. Dec. 1453, where extensive give and take had taken place, and the employer had initiated action on bargaining in some instances, despite being in a financially troubled situation, the Board said that the process had indeed been unsuccessful but not because of the reasons set out in the Act.

14. By contrast, in *Teledyne*, [1986] OLRB Rep. October 1441, the process was held not yet unsuccessful where there were a low number of meetings (although the Board observed that there was no minimum number required for a finding of unsuccessful bargaining), inexperienced negotiators, and substantial progress, in the context of a strike. The context included the fact that the applicant wanted the benefit of the provisions of section 40a(13) returning people to work if a direction under 40a were made. It appears there was nothing eventful about the bargaining until the strike/lockout. In *Juvenile Detention (Niagara)*, [1987] OLRB Rep. Jan. 66, the process was



also found to be not yet unsuccessful where the parties “could profit from further discussion”. Both parties thought more could be accomplished at the table and the employer was prepared to sign a standard contract.

15. In *MacMillan Bloedel Building Materials Limited*, [1990] OLRB Rep. Jan. 58 the process was held to have been unsuccessful after five meetings where the parties were at impasse and the respondent’s positions showed that it intended to penalize employees for having joined the union by offering less than what they were currently receiving, or at best, a two tier wage structure. Even though both parties had been uncompromising, the Board was convinced that bargaining had been unsuccessful because of the nature of the company’s proposals. It found there was “no reasonable possibility either party will abandon the principle behind their respective bargaining positions.”

16. In this case, the conclusion that the bargaining process was unsuccessful is inseparably intertwined with our finding that the company adopted and maintained two positions which were uncompromising and without reasonable justification. These are the positions surrounding the transfer of certain language from the personnel handbook into the collective agreement and the position taken on “job security” which would have required the union to agree to forego any attempt to restrict contracting out in other collective agreements. The bargaining process foundered on these two matters. There were also other positions such as that on mandatory drug testing of which the union complained on which it is unnecessary to comment in light of these findings and we decline to do so. Although there was much else left to discuss, including all monetary matters, it was clear that a collective agreement would not have been concluded without the resolution of these two important language issues. The facts in this case do not give us confidence that the matter would profit from further discussion and thus we cannot accept company counsel’s invitation to return the parties to the bargaining table. Counsel’s appeal to not provide an easy way out, to let the parties “do the hard thing” of hammering it out at the table, comes too late. It has already been demonstrated that the process was not working; it was unsuccessful. We turn then to the reasons for this lack of success.

17. In January, 1988, a few months before the application for certification in this matter, the company distributed for the first time a personnel policies manual, the drafts of which were prepared by Mr. Torakis. It is a fairly lengthy document containing the thinking of the company on its requirements for success, its personnel policies and rules for employees. It includes a form for each employee to sign, acknowledging receipt and informing the employer that the manual has been read, with the words at the bottom, “THIS PAGE IS TO BE SIGNED, DATED AND RETURNED TO YOUR SUPERVISOR.” Although it was contemplated that if a collective agreement was signed, the manual might have to be withdrawn, at the time of the hearing the manual was still given to every new hire. Section Two of that manual is entitled “Non-Union Philosophy”. It expresses the belief of the company that it is in the best interest of all of its employees that it stay union-free. The text continues:

By working together with these two common goals of customer satisfaction and company profitability, we will all prosper. We have found that Venture Canada employees work better without interferences which disrupt our spirit of teamwork. Labor unions do not share our two main goals, and their objectives often interfere with our ability to work well together. For example, we have found that unions are usually most concerned about their own strength, power and financial success - objectives which are actually counter-productive to our efforts.

In most cases, our employees enjoy better benefits, wages, security and communication than union workers doing similar work. We work together to satisfy our customers, and the result has been that Venture Canada employees generally have greater job security and better wages and benefits than union employees doing similar work.

This material (as well as most of the rest of the content of the personnel manual) was reworked by Mr. Lowe to form part of the company's proposals. Section Two of the company's proposals is entitled "Objectives, Commitments, Responsibilities and Rights". It reads in part as follows:

By working together with these two common goals of customer satisfaction and company profitability, we will all prosper. We have found that Venture Canada employees work best without interferences which disrupt our spirit of teamwork. Parties which do not share these goals, and their objectives, often interfere with our ability to work well together. For example, parties that are most concerned about their own strength, power and financial success are actually counter productive to the long term well-being and security of Venture Canada and its employees. The result of working together to satisfy our customers has been that Venture Canada employees generally have greater job security and better wages and benefits than employees of other companies doing similar work.

The union objected to this language both on the basis of its origin in the "anti-union philosophy" section of the manual and on the basis that it was unenforceable, would require costly arbitration to determine its meaning, and was out of place in a collective agreement.

18. The company removed the "anti-union philosophy" heading from the clause when the personnel manual language was reworked for the negotiating proposals. It maintains that it no longer has an anti-union philosophy in its Canadian subsidiary although Mr. Lowe acknowledged that it maintains such a philosophy in the American parent which controls Venture Canada. The company's justification for the above clause is set out most concisely in its minutes: "To be negotiated, this section is fundamental in establishing philosophy of contract". We find it unreasonable, and provocative to say the least, to insist that a union agree to language which is obviously anti-union in origin and would be seen as such by every employee who read the collective agreement after having read the personnel handbook as they were required to do. The justification given is insufficient to overcome this obstacle to its acceptance as reasonable, even if one accepts that the only remaining philosophy is one of customer satisfaction and company profitability. The language as it stands is unnecessary to the maintenance of those dual goals. The thrust of Mr. Torakis' evidence made it clear that an educational objective was part of the reason for wanting the language in the collective agreement. The company wanted the union and each employee to share its philosophy. Given its anti-union origin and the conflict between that and the whole scheme of the *Labour Relations Act*, starting with the preamble, we find it to have been adopted without reasonable justification.

19. Despite the indication quoted in its minutes above that it would negotiate this clause, the company had proposed no changes up until the time of the hearings, and always took the position at the table that the personnel policy material would be part of the collective agreement. The minutes themselves refer to it as fundamental. Therefore we found this to be a bargaining position correctly described as having an uncompromising nature in the words of section 40a(2)(b).

20. The job security language reads as follows:

Venture Canada recognizes that job security is essential to an employee's well being and acknowledges that it has a responsibility, with the cooperation of the union, to provide stable employment to its workers. Hence, Venture Canada agrees that it will not permanently lay off employees unless compelled to do so by severe economic conditions that threaten the long term financial viability of Venture Canada. Furthermore, Venture Canada will not lay off any employee as a result of specific gains realized through the Quality Improvement Process.

Venture Canada will take affirmative measures to avoid laying off any employees including such measures as, attempting to secure new business where competitive, and striving to meet any necessary reductions through attrition if possible.

The Union, as the sole and exclusive bargaining agent of the hourly employees covered in this agreement, will not enter into any contracts or agreements with any direct or indirect customers, competitors or suppliers of Venture Canada; or other trade unions, or political parties that may potentially threaten the "job security" of its members employed by Venture Canada. Specifically, the union will not sign any agreements with other parties that limit out sourcing of work to suppliers.

In summary, the Parties to this Agreement recognize that job security for bargaining unit employees will help to ensure Venture Canada's growth and that Venture Canada's growth will ensure job security.

21. Paragraphs one, two and four of this proposal, based on a clause in a California collective agreement, about which more will be said later, were unproblematic; the Union indicated its acceptance of them on August 11. It is the third paragraph which it could not sign. This was a clause drafted by Mr. Lowe, as part of a general effort on his part to avoid generic provisions which had no relevance to the Wallaceburg plant.

22. The respondent is a supplier. It is clear that the purpose of tabling this "job security" language was to take a shot at all restrictions in CAW contracts which limit outsourcing (subcontracting) by other employers and therefore reduce the amount of work available to suppliers. Although Mr. Lowe attempted to make a distinction between the two terms "outsourcing" and "subcontracting" we find that the evidence does not support the conclusion that this distinction was real, or made between the parties at the table. We find that the language, if accepted, would have had the effect of prohibiting the union from bargaining with anyone, anywhere, any restriction on out-sourcing or sub-contracting. Although read strictly, given the punctuation employed, the clause could be read to prohibit the union from entering into any contracts with anyone who was a customer, competitor or supplier of Venture Canada, the company explained in the minutes Mr. Lowe sent to the Union after the September 27, 1989 negotiating session what it intended:

Venture Canada had tabled three paragraphs in Section 3 that made a very strong commitment to job security for Venture Canada employees. In return, the company asked for language from the union that they would not enter into any agreement that might threaten the job security of its members employed at Venture Canada; specifically those that may limit outsourcing.

The company, in Mr. Lowe's words, "thought paragraphs two and four were a pretty bold statement on the company's part. We wanted something equally bold in return."

23. The company's minutes have attached to them a summary of their view of the positions of the parties after each of the sessions from August 11, 1989 on. The company's position about paragraph 3 in each of the minutes of August 11, September 27 and October 23 meetings is the same, and reads as follows:

Paragraph 3 is essential to the success and security of our employees and therefore, will be retained.

The company indicated it would be agreeable to taking out the words "political parties", but despite several lengthy discussions of the rest of the wording indicated no flexibility on the rest of the language. Since the company said it was willing to remove the reference to political parties, (although the "political parties" portion of the language remained in its proposals at the time of the hearing) we do not comment on the union's argument that the political parties language was illegal in Ontario. There were heated discussions on this language on a number of occasions and bargaining seemed inevitably to circle back to it. At the last meeting on October 23 it was the focus of what Mr. Rustin described as a vicious argument. Rustin quotes the company as saying paragraph three would be maintained "hell or high water." Mr. Torakis, the company spokesperson at that



meeting, did not say otherwise in his testimony. Nor did Mr. Pavlovic, who was present at that meeting. Although Mr. Lowe suggested the company could have been flexible on the language, he was not at the last meeting, did not indicate flexibility about the concept itself and agreed that any flexibility was never communicated to the union. Nor could he be specific about what flexibility actually existed. We have no hesitation in finding that this position was of an uncompromising nature.

24. Further, we are of the view that it was maintained by the respondent without reasonable justification. It is an attempt to extend the reach of the bargaining between these two parties well beyond the employees for which the certificate was granted. The union was being asked, at this bargaining table with a mandate from a bargaining unit of approximately a hundred employees to bind the thousands of employees in its other bargaining units, and indirectly their employers.

25. In *Formula Plastics Inc.*, [1987] OLRB Rep. May 702, the Board noted that in requiring the Board to examine the intrinsic reasonableness of a negotiating position, section 40a leads the Board well beyond the inquiry required under section 15's requirement of bargaining in good faith. It said at paragraphs 24 to 26:

24. But was the employer's position taken without reasonable justification? Much depends on our interpretation of "reasonable" in this regard. Obviously the employer in this matter did have reasons for taking this position in the sense that it hoped to achieve a contract provision of benefit to itself. However, in our view, "reasonable" must mean something more than simply a rational relationship between a bargaining position and a party's self-interest. This test is so minimal that it would make the relief provided by section 40a(2)(b) virtually inaccessible, a result which we find inconsistent with the remedial nature of this provision. Reviewing the section as a whole, and having regard to the Board's analysis in *Nepean Roof Truss, supra*, and *Juvenile Detention Centre (Niagara)*, [1987] OLRB Rep. Jan. 66, we find it difficult to conclude that the legislation was designed to do no more than ensure that parties were looking after their own interests in a logical way.

25. Rather, in our view, the word "reasonable" imports an objective element into our consideration of the respondent's justification for its position. It is not simply a matter of whether the justification is reasonable from the respondent's point of view, or even from the applicant's. The legislation draws us into an unavoidable assessment of whether a given proposal or position is reasonable in objective terms, a task which to some extent takes the Board into uncharted waters.

26. This is so, in part, because reasonableness is a relative concept; what is reasonable depends largely, if not entirely, upon the context in which such an examination is to be made. In considering section 40a(2)(b), such a context will include both the general landscape of labour relations and the specific labour relationship between the parties. In many cases such an assessment will also require the weighing and balancing of the opposing interests of the parties which they seek to pursue by way of their negotiating positions.

No other collective agreement was shown to have similar language. The collective agreements which Mr. Lowe used as models do not employ any language of such sweep. It is language that appears to the Board in its experience to be unprecedented. Although novelty is not proof of unreasonableness, it may require further explanation as to why it is justified than would be the case with more standard provisions.

26. The company justifies both the above proposals as necessary to its overall approach, which it refers to as contemporary management practices. These are related to its commitment to quality, which is necessary for its survival in the highly competitive automotive parts industry. We accept as undebatable that quality is a legitimately high priority for this company. However, the evidence did not convince us that the proposals set out above were justified on the basis of high

quality standards or any other reasonable basis. Paragraph 3 is clearly aimed at quantity of work, not quality of product. The company's minutes says it is necessary to the success and security of its employees. No justification was offered for this assertion other than the "boldness" of the company's other three paragraphs. We do not see a reasonable nexus between the offered assurances in paragraphs 1, 2 and 4 and the over-broad language and reach of paragraph 3. In addition, the spectre of litigation to interpret wording such as "agreements ... which may potentially threaten the job security of its members" sheds further light on the problematic nature of the language. It is not immediately obvious what beyond sub-contracting limitations the employer had in mind. If all the employer intended was the last sentence of paragraph 3, the rest of the language is mere surplusage and not reasonably justified on that basis. The language is very uncertain and invites litigation since it is difficult to see how one could ascertain its meaning without it. In such litigation an arbitrator chosen by the parties to this agreement would interpret some other agreement. Similar problems would exist in defining wording such as "direct or indirect customer" of Venture Canada.

27. The union urged us to find that insistence on these proposals was motivated by the anti-union philosophy the company acknowledged (in Mr. Lowe's evidence) to be part of the American parent company's current operations, and thus also constituted a failure to recognize the union's bargaining authority. This point is unnecessary to decide in this case given our findings above. In any event, motivation is not the primary focus of the section 40a inquiry. The position taken, together with its justification, is.

28. The company's position, as noted above, is that the real negotiations, the actual "horse-trading", was just about to begin. Implicit in this argument is the idea that the respondent should be permitted to posture, to maintain positions it knows are not attainable until it sees sufficient movement on the other side to warrant a demonstration of flexibility. In essence, the company argues that part of its justification for maintaining the above positions, which it does not see as unreasonable, was that it was too early to give them up. The Board is well aware that posturing is an integral part of collective bargaining in this province. There may be cases in which a direction under section 40a will properly be refused on such grounds. We do not think this is one of them. Every indication was that the respondent had no intention of compromising on the above language. Its own minutes demonstrate this. At a time when the union had clearly indicated that it was considering strike or bringing this application, the company sent its final set of minutes to the union, with each and every one of its positions unchanged from the previous meeting. Together with the positions taken at the table, we find this to indicate that the crucial positions were being maintained inflexibly, from the first to the last. Further, neither Mr. Torakis nor Mr. Lowe indicated any real flexibility on the core of their proposals in their testimony. In addition, and perhaps most importantly, part of the changed statutory landscape for bargaining after the introduction of section 40a is that posturing, like all other conduct during first contract negotiations, will be subject to scrutiny according to the standards set out in the section.

29. The conduct of both parties at the table was put squarely in issue, and in coming to the conclusion that arbitration should be directed we have considered not just the respondent's conduct, but that of the applicant as well. In determining whether the bargaining process has been unsuccessful, and if so, whether it is because of the respondent's actions or inaction, it is necessary to consider all the surrounding circumstances. It cannot be done in a vacuum, without regard to the context, which of necessity includes the behaviour of both parties.

30. We have therefore carefully considered the company's allegations that the union's position at the table was "to give the company a hard time" in return for its perception that the company had given them a hard time during the certification proceedings. Mr. Rustin may well have held the view that the company had given the union a hard time because of the number of days of

hearing for the certification and the number of issues raised by the company. This view is implicit in the union position referred to above at paragraph 7. However we are not persuaded that, if so, such a view was responsible for the lack of success of these negotiations. Neither side chose to conduct itself with diplomatic demeanour at the table; both sides appear to have "given as good as they got" in terms of rhetoric. Section 40a does not require statesmanlike conduct, or for parties to have wiped the slate completely clean from previous proceedings. It does require arbitration where the preconditions have been met, as we have found that they were.

31. We have come to similar conclusions about the company's allegations that the union caused lack of success because, through Mr. Rustin, it "cluttered" the bargaining table with issues such as the section 89 complaint, tabled the CAW "generic" proposed collective agreement and stated its disagreement with the conceptual basis of two collective agreements the company had used as models in putting together its proposals.

32. The evidence does not support the conclusion that the section 89 complaint or other issues such as pay for the union negotiating team was the barrier to success in negotiations rather than the respondent's positions. The respondent submits that the time eaten up with those issues meant that the parties were still at an early stage of bargaining. It is true that there was still much bargaining work left to be done, but in terms of the two above issues which were central to the lack of success, there had been plenty of time for the intractable nature of the problems caused to the bargaining process by these positions to become clear.

33. Nor do we find the fact that the applicant tabled a generic document, which it uses as a checklist so that no issues get missed, to have caused the lack of success in bargaining. Since the union worked from the company's document from the time the company tabled its proposals, we find no merit in the contention that the standard CAW document was the cause of the problems in bargaining. In any event, the company also borrowed heavily from agreements which were not "tailor-made" for Wallaceburg.

34. The company raised a further point as an indication that it was actually the union who was responsible for the unsuccessful bargaining. This was Mr. Rustin's difficulty in accepting what the parties refer to as the CAMI and NUMMI collective agreements. The first is a collective agreement in an Ontario automobile manufacturing plant between CAMI Automotive Inc. and the CAW, effective between January 23, 1989 and September 14, 1992. The second is a collective agreement concerning a California car manufacturing plant between New United Motor Manufacturing, Inc. and the UAW, effective between July 1, 1988 and June 30, 1991. They are both examples of agreements which incorporate to some extent a "team concept" between management and union, and both share some influence of Japanese work practices. Mr. Lowe borrowed language from both contracts when putting together the company's proposals, although it was never suggested that the company wished to sign a collective agreement modelled on the entirety of either one. Mr. Rustin clearly is not a proponent of the direction taken by these two collective agreements. Despite this, he demonstrated willingness to agree to language taken directly from them. For example, the job security language above, in its unobjectionable part, is closely modelled on the NUMMI collective agreement (although it is less generous to the union than the original). Mr. Rustin tabled that portion for sign-off at the meeting following the one in which the company proposed it. In light of this and in light of the fact that much of what the company tabled was at odds with language on the same subjects in both the CAMI and NUMMI documents, we cannot conclude that Mr. Rustin's reluctance to embrace these contracts caused these negotiations to break down. Nor were the positions which we have found to be responsible for the lack of success of negotiations drawn from either of these documents. In light of this, it is not necessary to resolve



the dispute in the evidence as to whether Mr. Rustin was to consult with his superiors about these contracts, which Messrs. Torakis and Lowe assert and Mr. Rustin and Ms. Gander deny.

35. Given the above findings it is unnecessary to rule on the union's other arguments as to why arbitration should be directed. In the result, for all the above reasons, we directed arbitration under section 40a.







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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1990

### APPLICATIONS FOR CERTIFICATION

#### Bargaining Agents Certified Without Vote

**2709-88-R:** Teamsters, Chauffeurs, Warehousemen & Helpers Local No. 880, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Corporation of the Township of Colchester South (Respondent) v. Employee (Objector)

Unit: "all employees of the respondent in the Township of Colchester south, save and except Department Superintendents, persons above the rank of Department Superintendent, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in any bargaining units for which any trade union held bargaining rights as of February 1st, 1989" (4 employees in unit) (Having regard to the agreement of the parties)

**1361-89-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 507848 Ontario Ltd. c.o.b. as MORR-TEL Construction (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (21 employees in unit) (Having regard to the agreement of the parties)

**1362-89-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 507848 Ontario Ltd. c.o.b. as MORR-TEL Construction (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

**1635-89-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Racal-Chubb Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its facility located at 42 Shaft Road, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, employees employed for not more than 24 hours per week and students employed during the school vacation period" (26 employees in unit) (Having regard to the agreement of the parties)

**2202-89-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Toronto Structural Concrete Services Ltd. (Respondent) v. Operative Plasterers & Cement Masons International Association of the United States & Canada, Local 598 (Intervener)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Mun-



icipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

**2828-89-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. WCA Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its Collins & Aikman Division in the Town of Ingersoll, save and except forepersons, persons above the rank of foreperson, office and sales staff" (160 employees in unit) (Having regard to the agreement of the parties)

**2872-89-R; 3027-89-R; 3028-89-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Structural Contracting Ltd., Structural Flooring Finishing Ltd., Struct-Form International Ltd. (Respondents) v. The Operative Plasterers & Cement Masons International Association of the United States of America, Local 598 (Intervener)

Unit: "all construction labourers in the employ of the respondent in all sectors of the construction industry, other than the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (40 employees in unit)

**0044-90-R:** Hotel Motel & Restaurant Employees' Union, Local 442 (Applicant) v. St. Catharines Golf & Country Club Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of St. Catharines, save and except supervisors, persons above the rank of supervisor, office staff and students employed during the school vacation period" (48 employees in unit) (Having regard to the agreement of the parties)

**0171-90-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Maidstone (Respondent)

Unit: "all office, clerical and technical employees of The Corporation of the Township of Maidstone, save and except Deputy Administrator-Clerk, persons above the rank of Deputy Administrator-Clerk, Deputy Treasurer, Chief Building Official, Secretary to the Administrator-Clerk and employees in bargaining units for which any trade union held bargaining rights as of April 12, 1990" (10 employees in unit)

**0198-90-R:** Service Employees' International Union, Local 204 - Affiliated with S.E.I.U., A. F. of L., C.I.O., C.L.C. (Applicant) v. Willowood Personnel Services Ltd. (Respondent)

Unit #1: "all employees of the respondent at the Grenadier in the Municipality of Metropolitan Toronto, save and except supervisors, activity director, head chef, head of maintenance and day charge nurse, persons above the rank of supervisor, activity director, head chef, head of maintenance and day charge nurse, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (15 employees in unit) (Having regard to the agreement of the parties)

Unit #2: "all employees of the respondent at the Grenadier in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, activity director, head chef, head of maintenance and day charge nurse, office and clerical staff and persons above the rank of supervisor, activity director, head chef, head of maintenance and day charge nurse, and office and clerical staff" (23 employees in unit) (Having regard to the agreement of the parties)

**0386-90-R:** International Brotherhood of Painters & Allied Trades, Local 200, Ottawa (Applicant) v. Killarney Glass & Aluminium Ltd. (Respondent)

Unit: "all journeymen and apprentice glass and metal mechanics in the employ of the respondent in the indus-

trial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice glass and metal mechanics in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

**0407-90-R:** United Steelworkers of America (Applicant) v. Valley Savings (Renfrew County) Credit Union Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Deep River, save and except assistant manager, persons above the rank of assistant manager, commercial department supervisor and secretary to the general manager" (17 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

**0454-90-R:** Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. Thomson Newspapers Company Ltd. (Respondent)

Unit: "all employees of the respondent at its Oshawa Times Division, in the Regional Municipality of Durham, regularly employed for not more than 24 hours per week, and students employees during the school vacation period, save and except the Publisher and General Manager, Accountant, Assistant Accountant, Advertising Manager, Circulation Manager, Classified Department Manager, Maintenance Department Supervisor, Mail Room Supervisor, Editor, City Editor, News Editor, Secretary to the Publisher and General Manager, employees in bargaining units for which any trade union held bargaining rights as of May 17, 1990" (40 employees in unit)

**0507-90-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. Thrifty Canada Ltd. c.o.b. as Thrifty Car Rental (Respondent)

Unit: "all employees of the respondent at 6050 Indian Line Road in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (27 employees in unit) (Having regard to the agreement of the parties)

**0508-90-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. Thrifty Canada Ltd. c.o.b. as Thrifty Car Rental (Respondent)

Unit: "all employees of the respondent employed in Terminals 1 and 2 of the Pearson International Airport, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (16 employees in unit) (Having regard to the agreement of the parties)

**0554-90-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Cusentino Construction Inc. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all sectors of the construction industry in the the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

**0560-90-R:** Graphic Communications Union, Local 41M (Subordinate to Graphic Communications International Union) (Applicant) v. Thomson Newspapers Company Ltd. c.o.b. as Standard Freeholder (Respondent)

Unit: "all employees of the respondent in Cornwall in its editorial department, save and except the managing

editor, city editor, wire editor, sports editor, associate editor, persons above those ranks, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and students employed on a co-operative training program" (12 employees in unit) (Having regard to the agreement of the parties)

**0576-90-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. Holiday Inn of Oshawa of the Commonwealth Hospitality Ltd. (Respondent)

Unit: "all front desk employees of the respondent at its hotel in Oshawa, save and except Guest Services Manager, persons above the rank of Guest Services Manager, office and clerical staff, banquet staff, security staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of May 24, 1990" (7 employees in unit) (Having regard to the agreement of the parties)

**0585-90-R:** Service Employees Union, Local 210 (Applicant) v. Heritage Living Centres Ontario Inc. (Respondent)

Unit: "all employees of the respondent in Kincardine, save and except supervisors, persons above the rank of supervisor, professional medical staff, and registered and graduate nurses" (12 employees in unit) (Having regard to the agreement of the parties)

**0603-90-R:** Service Employees' International Union, Local 204, affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Community Living Niagara Falls (Respondent)

Unit: "all employees of the respondent at its Fourth Avenue Group Home in Niagara Falls, save and except forepersons, persons above the rank of foreperson, and office staff" (8 employees in unit) (Having regard to the agreement of the parties)

**0618-90-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. 535052 Ontario Ltd. c.o.b. Delrose Retirement Residence (Respondent)

Unit #1: "all employees of the respondent at its retirement home in Delhi, save and except the Administrator, persons above the rank of administrator, Registered and Graduate Nurses, and persons regularly employed for not more than 24 hours per week" (2 employees in unit) (Having regard to the agreement of the parties)

Unit #2: "all employees of the respondent at its retirement home in Delhi, regularly employed for not more than 24 hours per week, save and except the Administrator, persons above the rank of Administrator, Registered and Graduate Nurses" (5 employees in unit) (Having regard to the agreement of the parties)

**0638-90-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Harnden & King Construction A Division of George Wimpey Canada Ltd. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, in the employ of the respondent in the Townships of Arnott, Elgie and Hornepayne, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (34 employees in unit)

**0645-90-R:** Hotel, Motel & Restaurant Employees Union, Local 442 (Applicant) v. John Crothall Hospital Services Ltd. (Respondent)

Unit #1: "all employees of the respondent in the Regional Municipality of Niagara, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (23 employees in unit) (Having regard to the agreement of the parties)

Unit #2: "all employees of the respondent in the Regional Municipality of Niagara regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except



supervisors, persons above the rank of supervisor" (5 employees in unit) (Having regard to the agreement of the parties)

**0654-90-R:** International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada, Local 58 (Applicant) v. The National Ballet of Canada and The National Ballet School and R. A. Laidlaw Center and Betty Oliphant Theatre (Respondents) v. Group of Employees (Objectors)

Unit: "all stage employees of The National Ballet of Canada in the Municipality of Metropolitan Toronto, save and except supervisors, and those above the rank of supervisor, and persons for whom a trade union held bargaining rights on June 5, 1990" (7 employees in unit) (Having regard to the agreement of the parties)

**0667-90-R:** International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. High-Reach Maintenance Ltd. (Respondent)

Unit: "all journeymen and apprentice insulators and asbestos workers in the employ of the respondent in the County of Lambton, save and except foremen, persons above the rank of foreman, and employees in bargaining units for which any trade union held bargaining rights as of June 6, 1990" (9 employees in unit) (Having regard to the agreement of the parties)

**0674-90-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Ata Construction Ltd. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**0681-90-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Mergin Excavating & Contracting Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**0704-90-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Kuriyama Canada Inc. (Respondent)

Unit: "all employees of the respondent in Brantford, save and except team leaders, persons above the rank of team leader, sales and office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (38 employees in unit) (Having regard to the agreement of the parties)

**0728-90-R:** United Food & Commercial Workers International Union, AFL-CIO-CLC (Applicant) v. 851293 Ontario Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of 851293 Ontario Inc. carrying on business as Loeb IGA, 100 William Street, Chatham, Ontario, save and except department managers, persons above the rank of department manager, head cashier, and office and clerical staff" (99 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

**0757-90-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. The Corporation of the Town of Oakville (Respondent)

Unit #1: "all employees of the respondent employed in its Transit Department in Oakville, save and except forepersons, persons above the rank of forepersons, inspectors, dispatcher/training safety officer, storekeeper and office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (84 employees in unit) (Having regard to the agreement of the parties)

Unit #2: "all employees of the respondent employed in its Transit Department in Oakville regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except forepersons, persons above the rank of forepersons, inspectors, dispatcher/training safety officer, storekeeper and office staff" (7 employees in unit) (Having regard to the agreement of the parties)

**0814-90-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Coulson Contracting Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

**0849-90-R:** International Union of Operating Engineers, Local 793 (Applicant) v. St. Lawrence Cement Inc. (Respondent)

Unit: "all employees of the respondent in its Dufferin Aggregate Division at its yard at 1185 Martin Grove Road in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (Having regard to the agreement of the parties)

**0860-90-R:** United Food & Commercial Workers International Union, AFL:CIO:CLC: (Applicant) v. Jacques Belle-Isle Wholesale Cash & Carry Ltd. (Respondent)

Unit: "all employees of the respondent at Hawkesbury, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (Having regard to the agreement of the parties)

**0873-90-R:** Teamsters Local No. 230, Ready-Mix Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Country Building Supplies Ltd. (Respondent)

Unit: "all employees of the respondent in Port Perry, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit)

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**2552-89-R:** Ontario Public School Teachers' Federation (Applicant) v. The Elgin County Board of Education (Respondent)

Unit: "all occasional teachers and supply instructors employed by the respondent in its elementary panel in the County of Elgin, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the School Boards and Teachers Collective Negotiations Act" ( employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Persons added to voters' list on consent of parties	1
Number of names of persons on revised voters' list	212
Number of persons who cast ballots	58
Number of ballots marked in favour of applicant	57
Number of ballots marked against applicant	1

**2991-89-R:** IWA Canada (Applicant) v. Eddy Match Company Ltd. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 2823 (Intervener)

Unit: "all employees of the respondent at its Canadian Splint Division in the Town of Pembroke, save and except foremen, persons above the rank of foreman, office and sales staff and head log scaler" (53 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	83
Number of persons who cast ballots	51
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	24
Ballots segregated and not counted	9

**2992-89-R:** IWA-Canada (Applicant) v. Maison Renaissance Inc. (Respondent)

Unit: "tous les employé(e)s de l'intim l'exception du directeur g n ral, l'adjoint - administratif et la secr taire confidentielle" (24 employees in unit) (Having regard to the agreement of the parties)

Nombre de personnes qui ont vote	23
Nombre de bulletins de vote pour le requérant	18
Nombre de bulletins de vote contre le requérant	5

**3073-89-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. McKay - Cocker Construction Ltd. (Respondent) v. The Provincial Conference of Ontario of the Operative Plasterers' and Cement Masons' International Association of the United States & Canada (Intervener #1) v. The Operative Plasterers' and Cement Masons' International Association of the United States & Canada, Local 598 (Intervener #2) v. The Operative Plasterers' and Cement Masons' International Association of the United States & Canada (Intervener #3)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on list as originally prepared by employer	2
Number of names of persons on revised voters' list	2
Number of persons who cast ballots	1
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	0

**3302-89-R:** The Independent Canadian Transit Union (Applicant) v. Campeau Corporation (Respondent) v. United Food & Commercial Workers International Union, Local 329 (Intervener)

Unit: "all employees in the maintenance department of the property management division of the respondent in the Ottawa area, save and except persons classified as foremen, persons above the rank of foreman, student hired on a part-time or seasonal basis, office and sales staff, persons otherwise covered for collective bargaining purposes, the elevator mechanics and their helpers, and the electricians employed by the company in the Regional Municipality of Ottawa-Carleton" (26 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	23



Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	22
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	19
Number of ballots marked in favour of intervener	3
Ballots segregated and not counted	1

**3304-89-R:** The Independent Canadian Transit Union (Applicant) v. Campeau Corporation (Respondent) v. United Food & Commercial Workers International Union, Local 329 (Intervener)

Unit: "all elevator mechanics, helpers and electricians of Campeau Corporation in Ottawa, Ontario, save and except foremen, persons above the rank of foreman, students hired on a seasonal basis during the months of May, June, July, August and September and persons covered by subsisting Collective Agreements" (9 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	0

**0011-90-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the Borough of East York (Respondent)

Unit: "all occasional teachers as defined by section 1(1)31 of the Education Act employed by the respondent in its secondary panel in the Municipality of Metropolitan Toronto, save and except persons who, when they are employed as substitutes for teachers, are teachers as defined by the School Boards and Teachers Collective Negotiations Act in section 1(m)" (115 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on list as originally prepared by employer	104
Number of persons who cast ballots	31
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	1

**0178-90-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Intrepid General Ltd. (Respondent) V. Construction Workers, Local 53, CLAC (Intervener)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Province of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	14
Number agreed to be counted by parties	9
Number of ballots marked in favour of applicant	6
Number of ballots marked in favour of intervener	3
Ballots segregated and not counted	5

**0258-90-R:** International Union of Operating Engineers, Local 772 (Applicant) v. Johnson Controls Ltd. (Respondent)

Unit: "all employees of the respondent at the court house, 700 North Christina Street in the City of Sarnia, save and except service manager and those persons above the rank of service manager" (2 employees in unit)

Number of names of persons on list as originally prepared by employer	2
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2

Number of ballots marked against applicant 0

**0278-90-R:** Independent Canadian Transit Union (Applicant) v. Campeau Corporation (Respondent) v. The Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: "all stationary engineers, skilled workers and their helpers at Place De Ville project, save and except the chief engineer, the assistant chief engineer, students hired for the summer vacation period, elevator mechanics, electricians and their helpers and employees for whom any other trade union held bargaining rights as of April 26, 1990" (20 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	14
Number of ballots marked in favour of intervener	3

**0473-90-R:** Canadian Union of Public Employees (Applicant) v. North York Board of Education (Respondent)

Unit: "all continuing education instructors employed by the respondent as adult English as a second language instructors and adult basic literacy instructors in North York, save and except lead instructors and supervisors, persons above the rank of lead instructor or supervisor and persons for whom any trade union held bargaining rights as of May 15, 1990" (236 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	238
Number of persons who cast ballots	77
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	67
Number of ballots marked against applicant	9
Ballots segregated and not counted	1

### **Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**3015-89-R:** Ontario Public School Teachers' Federation (Applicant) v. The Peterborough County Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the County of Peterborough, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the School Boards and Teachers Collective Negotiations Act" (178 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	190
Number of persons who cast ballots	79
Number of ballots marked in favour of applicant	78
Number of ballots marked against applicant	0
Ballots segregated and not counted	1

**0189-90-R:** London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Cedarwood Acres Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at the Cedarwood Village complex in Simcoe, save and except supervisors, persons above the rank of supervisor, registered, graduate and undergraduate nurses, office and clerical staff" (41 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	38
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	13

## Ballots segregated and not counted

1

**0197-90-R:** Service Employees International Union, Local 204, affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Saint Luke's Place (Respondent)

Unit #1: "all employees of the respondent in Cambridge, save and except supervisors, persons above the rank of supervisor, registered, graduate and undergraduate nurses, professional medical staff, paramedical employees, activation director, office and clerical employees, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (82 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	89
Number of persons who cast ballots	75
Number of ballots marked in favour of applicant	42
Number of ballots marked against applicant	33

Unit #2: (see Applications for Certification Dismissed Without Vote)

### Applications for Certification Dismissed Without Vote

**3303-89-R:** The Independent Canadian Transit Union (Applicant) v. Canadian Linen Supply Co. Ltd. (Respondent) (2 employees in unit)

**0197-90-R:** Service Employees International Union, Local 204, affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Saint Luke's Place (Respondent) (29 employees in unit) Unit #1: (see Bargaining Agents Certified Subsequent to a Post-Hearing Vote)

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**2890-89-R:** IWA-Canada (Applicant) v. Eddy Match Company Ltd. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 3175 (Intervener)

Unit: "all employees of the respondent in the Town of Pembroke, save and except foreman, persons above the rank of foreman, office and sales staff" (289 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	289
Number of persons who cast ballots	211
Number of ballots marked in favour of applicant	82
Number of ballots marked in favour of intervener	129

**0132-90-R:** Canadian Paperworkers Union (Applicant) v. Abitibi Price Inc. (Respondent) v. International Union of Operating Engineers, Local 865 (Intervener)

Unit: "all employees of the respondent at its Thunder Bay Division in Thunder Bay employed in the steam plant department, save and except supervisors and those above the rank of supervisor, and persons employed in any bargaining units for which any trade union other than the incumbent, International Union of Operating Engineers, Local 865 held bargaining rights as of April 9, 1990" (17 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	16
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	9

**0548-90-R:** IWA-Canada (Applicant) v. Elk Lake Planing Mill Ltd. (Respondent) v. Elk Lake Planing Mill Employees' Association (Intervener)

Unit: "all employees of the respondent at Elk Lake, engaged in sawmill, planing mill, and yard operations,



save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (94 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	91
Number of persons who cast ballots	89
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	86
Number of segregated ballots cast by persons whose names appear on voters' list	3
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	19
Number of ballots marked in favour of intervener	63
Ballots segregated and not counted	3

**0616-90-R:** Labourers' International Union of North America, Local 527 (Applicant) v. Marathon Realty Company Ltd. (Respondent)

Unit: "all employees of the respondent engaged in all cleaning service at the Place D'Orleans Shopping Centre, Orleans, Ontario, save and except operations supervisor, persons above the rank of operations supervisor, office, clerical and sales staff" (6 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	3

#### **Applications for Certification Dismissed Subsequent to a Post-Hearing Vote**

**0360-90-R:** Teamsters, Local No. 419 (Applicant) v. VS Services Ltd. (Respondent)

Unit: "all employees of the respondent at its Diplomat Coffee System Division in Burlington, save and except supervisors, persons above the rank of supervisor, office and sales staff" (8 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	5

**0445-90-R:** IWA-Canada (Applicant) v. Chapeau Forest Products Ltd. (Respondent)

Unit: "all employees of the respondent in the Town of Chapeau, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period" (118 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	98
Number of persons who cast ballots	95
Number of ballots marked in favour of applicant	45
Number of ballots marked against applicant	50

**0477-90-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Gilbarco Canada Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all office, clerical and technical employees of the company in Brockville, save and except supervisors and persons above the rank of supervisor" (56 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on list as originally prepared by employer	35
Number of persons who cast ballots	32

Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	18
Ballots segregated and not counted	1

### **Applications for Certification Withdrawn**

**2126-88-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Rainone Construction Ltd. (Respondent) v. Group of Employees (Objectors)

**0179-90-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Intrepid General Ltd. (Respondent) v. Construction Workers, Local 53, CLAC (Intervener)

**0228-90-R:** Labourers' International Union of North America (Applicant) v. Inaugural Investments Ltd. (Respondent)

**0296-90-R:** Labourers' International Union of North America, Local 493 (Applicant) v. Archy Greco Paving Ltd. (Respondent)

**0385-90-R:** International Brotherhood of Painters & Allied Trades, Local 200, Ottawa (Applicant) v. Killarney Glass & Aluminum Ltd. (Respondent)

**0422-90-R:** Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. C. N. Tower Ltd. (Respondent)

**0466-90-R:** United Steelworkers of America (Applicant) v. 357319 Ontario Ltd. c.o.b. as H & H Manufacturing (Respondent)

**0474-90-R:** Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 493 (Applicants) v. Central Terrazzo & Tile Co. and Ontario Concrete Pumping Ltd. (Respondents)

**0556-90-R:** Christian Labour Association of Canada (Applicant) v. One-Vinyl Window Manufacturers Ltd. (Respondent) v. International Brotherhood of Painters & Allied Trades, Glaziers & Glassworkers, Local 1819 (Intervener)

**0586-90-R:** International Union of Operating Engineers, Local 796 (Applicant) v. Montfort Hospital (Respondent)

**0591-90-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. Holiday Inn of Oshawa of the Commonwealth Hospitality Ltd. (Respondent)

**0668-90-R:** International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. High-Reach Maintenance Ltd. (Respondent)

**0679-90-R; 0680-90-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Bermingham Construction Ltd. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 18 (Intervener)

**0723-90-R:** The Association of Canadian Film Craftspeople (Applicant) v. Accent Three Productions Inc. (Respondent) v. National Association of Broadcast Employees & Technicians, Local 700 (Intervener)

**0770-90-R:** United Steelworkers of America (Applicant) v. Blackburn Villa (Respondent)

**0830-90-R:** International Association of Machinists & Aerospace Workers (Applicant) v. D.D.M. Plastics Inc. (Respondent) v. Group of Employees (Objectors)

## APPLICATIONS FOR FIRST CONTRACT ARBITRATION

**0697-90-FCA:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Venture Industries Canada, Ltd. (Respondent) (Granted)

**0756-90-FC:** International Union of Operating Engineers, Local 793 (Applicant) v. Innisfil Landfill Corporation (Respondent) (Granted)

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**0465-89-R:** York University Staff Association (Applicant) v. York University and York University Development Corporation (Respondents) (Withdrawn)

**1041-89-R:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Landmark Contracting Ltd. and Landmark Structures (Ontario) Ltd. (Respondents) (Dismissed)

**2147-89-R:** Teamsters Local No. 879, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Cronkwright Transport Ltd., Erie Employee Services Ltd. (Respondents) (Granted)

**2387-89-R:** International Ladies Garment Workers' Union, Locals 14, 83 & 92 (Applicants) v. Highlite Fashions Ltd., JAI International, and Dreaming Fashions Ltd. (Respondents) v. Toronto Dress & Sportswear Manufacturers' Guild (Intervener) (Dismissed)

**0146-90-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Siteco Electric Ltd. and Leo Alarie & Sons Ltd. (Respondent) (Withdrawn)

**0396-90-R:** Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1089 (Applicants) v. Trisar Ltd. and 757700 Ontario Ltd. and Brad Developments (Respondents) (Withdrawn)

**0574-90-R:** International Ladies' Garment Workers' Union (Applicant) v. 562285 Ontario Ltd., c.o.b. as Don's Sportswear and Deen's Manufacturing, and 889397 Ontario Ltd. c.o.b. as NA Deen's Sportswear (Respondent) (Granted)

## SALE OF A BUSINESS

**1767-87-R:** United Food & Commercial Workers International Union, Locals 175 & 633 (Applicant) v. Miracle Food Mart, a Division of Steinberg Inc. and 722686 Ontario Ltd., c.o.b. Ferlisi Supermarkets (Respondents) (Dismissed)

**2387-89-R:** International Ladies Garment Workers' Union, Locals 14, 83 & 92 (Applicants) v. Highlite Fashions Ltd., JAI International, and Dreaming Fashions Ltd. (Respondents) v. Toronto Dress & Sportswear Manufacturers' Guild (Intervener) (Dismissed)

**0396-90-R:** Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1089 (Applicants) v. Trisar Ltd. and 757700 Ontario Ltd. and Brad Developments (Respondents) (Withdrawn)

**0455-90-R:** Canadian Union of Operating Engineers & General Workers (Applicant) v. Tandem Realty Administration Inc. (Respondent) (Withdrawn)

**0574-90-R:** International Ladies' Garment Workers' Union (Applicant) v. 562285 Ontario Ltd., c.o.b. as Don's Sportswear and Deen's Manufacturing, and 889397 Ontario Ltd. c.o.b. as NA Deen's Sportswear (Respondent) (Granted)



## CROWN TRANSFER ACT

**0952-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Summers Logging & Tree Service (Respondents) (Granted)

**0953-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and John Knight and Lorraine Norris c.o.b. as Agassiz Forestry/Environmental Services (Respondents) (Granted)

**0954-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Marsha Ferguson (Respondents) (Granted)

**1071-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Longwood Forestry Service (Respondents) (Granted)

**1072-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and New Forest Contractors Inc. (Respondents) (Granted)

**1074-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Nicol Sequin (Respondents) (Granted)

**1330-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Rhiza Reforestation Inc. (Respondents) (Granted)

**1332-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Tree Mendous Landscaping (Respondents) (Granted)

**1334-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Bel-Moe Contracting (Respondents) (Granted)

**1337-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and 513145 Ontario Ltd. (Nigel Ford) (Respondents) (Granted)

**1338-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Outland Reforestation Inc. (Respondents) (Granted)

**1339-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and R. Goodfellow (Respondents) (Granted)

**1340-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and North Shore Nursery (Respondents) (Granted)

**1341-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Fred Krestel (Respondents) (Granted)

**1381-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Mr. Michael Sauve (Respondents) (Granted)

**1382-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Heittola Enterprises (Respondents) (Granted)

**1384-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Rob Neale (Respondents) (Granted)

**1385-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Hotchkiss Forestry Enterprises (Respondents) (Granted)

**1638-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Formac Forestry Consultant (Respondents) (Granted)

**1880-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and B.A.R. Associates (Respondents) (Granted)

**1881-88-R; 1882-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Alan Earwaker (Respondents) (Granted)

**1883-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Harry Staffell (Respondents) (Granted)

**1886-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Mairi Kobylanski (Respondents) (Granted)

**1887-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and The Board of Governors of Algonquin College of Applied Arts & Technology (Respondents) (Dismissed)

**1888-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Karen Gray (Respondents) (Granted)

**1995-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Captain Dan (Leavoy) Charters (Respondents) (Granted)

**2162-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Tim Closs (Respondents) (Granted)

**2322-88-R; 2323-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Transportation and Gord Chapman (Respondents) (Granted)

**2325-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Government Services and Canadian Janitor Service (Respondents) (Granted)

**2326-88-R; 2327-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Transportation and Angelo Bazzoni (Respondents) (Granted)

**2328-88-R; 2329-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Transportation and Marcel Dion (Respondents) (Granted)

**2331-88-R; 2332-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Transportation and Gary Falconer (Respondents) (Granted)

**2333-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Transportation and Lovas & Patterson Inc. (Respondents) (Granted)

**2336-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Transportation and Lloyd Boyce Paving Inc. (Respondents) (Granted)

**2337-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Transportation and Robert Hunter (Respondents) (Granted)

**2338-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Transportation and E & W Blane Truck & Exec. Ltd. (Respondents) (Granted)

**2340-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Aklavik Environment (Respondents) (Granted)

**2341-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Transportation and J. Neniska (Respondents) (Granted)

**2344-88-R; 2345-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Transportation and Dennis M. Brown (Respondents) (Granted)

**2246-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Transportation and Dave MacDonald (Respondents) (Granted)

**2347-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Transportation and T.D. Judson (Respondents) (Granted)

**2348-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Transportation and Allen Alcock and Charles Wyder (Respondents) (Granted)

**2349-88-R; 2350-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Transportation and Dave Siddall Trucking (Respondents) (Withdrawn)

**2932-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Cedar Snag Silviculture Inc. (Respondents) (Granted)

**0469-89-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Chris Kirwin (Respondents) (Granted)

**0470-89-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Nortek Resources Management (Respondents) (Granted)

## UNION SUCCESSOR RIGHTS

**0486-90-R:** Southern Ontario Newspaper Guild (Applicant) v. Niagara Newspaper & Printers Guild, Local 12 Canadian Labour Congress (Respondent) (Granted)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1915-88-R:** Sandra Taylor (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Thorold I.G.A. Market (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of Thorold I.G.A. Market in Thorold, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department managers, persons above the rank of department managers" (24 employees in unit) (Having regard to the agreement of the parties) (Granted)

Number of names of persons on list as originally prepared by employer	20
Number of persons who cast ballots	17
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	14

**1916-88-R:** Sandra Taylor (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Thorold I.G.A. Market (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of the Company at Thorold, Ontario, save and except meat department employees, meat department manager, persons above the rank of department manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit) (Having regard to the agreement of the parties) (Granted)



Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	19
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	9

**1917-88-R:** Sandra Taylor (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Thorold I.G.A. Market (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of the Company at Thorold, Ontario, save and except meat department manager, deli manager, persons above the rank of department manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (3 employees in unit) (Having regard to the agreement of the parties) (Granted)

Number of names of persons on list as originally prepared by employer	3
Number of persons who cast ballots	13
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

**2739-89-R:** Group of Employees at Welland Youth Group Home and Housing Programme Inc. (Applicants) v. United Food & Commercial Workers International Union and United Food & Commercial Workers International Union, AFL:CIO:CLC, Local 617P (Respondents) v. Welland Youth Group Home & Housing Programme Inc. -- Regional Municipality of Niagara (Intervener)

Unit: "all employees of Welland Youth Group Home and Housing Programme Inc. in its Niagara Regional Youth Home Programme in the Regional Municipality of Niagara, save and except programme supervisor, persons above the rank of programme supervisor, office and clerical staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week" (5 employees in unit) (Granted)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	4

**2804-89-R:** Durham Board of Education (Applicant) v. Ontario Secondary School Teachers' Federation (Respondent)

Unit: "all occasional teachers employed by the Durham Board of Education in its secondary panel in the Durham Region, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined by the School Boards and Teachers Collective Negotiating Act (Bill 100)" (162 employees in unit) (Dismissed)

Number of names of persons on revised voters' list	162
Number of persons who cast ballots	48
Number of ballots marked in favour of respondent	46
Number of ballots marked against respondent	2

**2832-89-R:** Jessie Spoon (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Payukotayno Corporation, c.o.b. as James and Hudson Bay Family Services (Intervener)

Unit: "all employees of Payukotayno Corporation, carrying on business as James and Hudson Bay Family Services in the Municipality of Moosonee and Moose Factory and the branch offices, save and except supervisors, persons above the rank of supervisor" (44 employees in unit) (Granted)

Number of names of persons on revised voters' list	44
Number of persons who cast ballots	36
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	36

**2958-89-R:** Dennis Deshamps (Applicant) v. United Food & Commercial Workers International Union, Local 329 (Respondent) v. Sun Life of Canada (Intervener)

Unit: "all employees of Sun Life of Canada in the Maintenance Department at Riverside Terrace (Hazeldean Mall and Sheffield Industrial Park) in the Ottawa area, save and except persons classified as foremen, persons above the rank of foreman, students hired on a part-time or seasonal basis, office and sales staff, persons otherwise covered for collective bargaining purposes, the Elevator Mechanics and their helpers, and the Electricians employed by the Company in the Regional Municipality of Ottawa-Carleton and persons regularly employed for not more than 24 hours per week" (6 employees in unit) (Granted)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	6

**3075-89-R:** Angela Ma (Applicant) v. Canadian Union of Restaurant & Related Employees, Hotel & Restaurant Employees Union, Local 88 (Respondent) v. J. I. Vent Investments Inc. c.o.b. Steak & Burger (Intervener) (27 employees in unit) (Dismissed)

**3191-89-R:** Jim Murphy (Applicant) v. United Steelworkers of America (Respondent) v. 4500 Taxi Ltd. (Intervener)

Unit: "all employees at 4500 Taxi Limited, save and except manager and dispatcher, persons above the rank of manager and dispatcher, office, clerical and sales staff" (25 employees in unit) (Granted)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	20
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	14

**3207-89-R:** Delores Kurt (Applicant) v. Amalgamated Clothing & Textile Workers Union, Western Ontario Joint Board (Respondent) v. Newtex Ltd. (Intervener)

Unit: "all employees of the employer at his plant located at 135 Ottawa Street, South, Kitchener, Ontario, save and except Complaint Supervisor, foremen, foreladies, persons above the rank of foreman, forelady, office, and clerical staff, counter girls and persons employed in a confidential capacity or exercising supervisory responsibilities, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and employees completing their trial period" (11 employees in unit) (Granted)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	6

**3211-89-R:** Peter Britton (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Urbandale Building Corporation Ltd. (Intervener)

Unit: "all construction labourers in the employ of Urbandale Building Corporation Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (Granted)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

**3254-89-R:** Leo Di Loreto (Applicant) v. Sheet Metal Workers' International Association, Local 47 (Respondent) v. Thos. K. Webster (1980) Ltd. (Intervener)

Unit: "all employees of Thos. K. Webster (1980) Ltd. in the City of Ottawa employed in the residential sector, save and except foremen, persons above the rank of foreman and office staff" (11 employees in unit) (Dismissed)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots marked in favour of respondent	8
Number of ballots marked against respondent	3

**0042-90-R:** Joseph Mailhoit (Applicant) v. Construction Workers, Local 53, CLAC (Respondent) v. Rose City Electric Ltd. (Intervener)

Unit: "all electricians and electricians' apprentices in the employ of Rose City Electric Limited in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit) (Granted)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	6

**0078-90-R:** Nancy Pierunek (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Respondent) v. Walfoods Ltd. (Employer)

Unit: "all employees of Walfoods Limited employed in the Townships of Bruce and Kincardine, save and except supervisors, persons above the rank of supervisor" (11 employees in unit) (Granted)

Number of names of persons on list as originally prepared by employer	13
Number of persons who cast ballots	10
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	10

**0209-90-R:** Martin Lewis (Applicant) v. United Steelworkers of America (Respondent) v. Wiresmith Ltd. (Intervener)

Unit: "all employees of the employer in Mississauga, save and except foremen, persons above the rank of foreman, office, sales and technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods (1st June to August 31st)" (43 employees in unit) (Granted)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	38
Number of ballots marked in favour of respondent	14
Number of ballots marked against respondent	28

**0238-90-R:** Paul Joseph (Applicant) v. Canadian Brotherhood of Railway, Transport & General Workers (Respondent) v. Bruce Cook (Intervener)

Unit: "all employees employed at the Company's terminal in the City of Barrie in the County of Simcoe, save and except foremen, persons above the rank of foreman, mechanics, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit) (Granted)

Number of names of persons on list as originally prepared by employer	7
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	0



**0285-90-R:** Terrance Dalton on his own behalf and on behalf of the employees of Aries Construction Management Ltd. (Applicant) v. Labourers' International Union of North America, Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 506 (Respondent) v. 492786 Ontario Ltd. c.o.b. as Aries Construction and Aries Construction Management Limited (Intervener) (Withdrawn)

**0292-90-R:** Employees Iroquois Falls Community Credit Union Ltd. (Applicant) v. Office & Professional Employees International Union (Respondent) v. Iroquois Falls Community Credit Union (Intervener) (5 employees in unit) (Granted)

**0336-90-R:** Ta-Mari Construction Ltd. (Applicant) v. Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Respondents) (Withdrawn)

**0594-90-R:** Teri Dunford (Applicant) v. Toronto Typographical Union #91 (Respondent) v. London Graphic Industries Inc. (Intervener) v. Group of Employees (Objectors) (Withdrawn)

**0673-90-R:** Robert Wilson (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) v. Mancor Canada Inc. (Intervener) (105 employees in unit) (Granted)

**0909-90-R:** Ljupco Dzivdzaroski (Applicant) v. United Steelworkers of America (Respondent) v. Chris Vasi-lev (Intervener) (20 employees in unit) (Granted)

## **APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT**

**0348-90-U:** Ontario Nurses' Association (Applicant) v. Regional Municipality of Haldimand-Norfolk (Respondent) (Withdrawn)

## **COMPLAINTS OF UNFAIR LABOUR PRACTICE**

**1245-89-U:** Administrative & Technical Staff Union (ATSU) (on behalf of its 'Z' unit members) (Complainant) v. Broadcast Council of CUPE (B.C.C.) (Respondent) (Withdrawn)

**1496-89-U:** Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. 507848 Ontario Ltd. c.o.b. as MORR-TEL Construction (Respondent) (Dismissed)

**1536-89-U:** Peterborough Typographical Union, Local 248 Printing, Publishing and Media Workers Sector of the Communications Workers of North America (Complainant) v. Thomson Newspapers Corporation & Wilson Ltd. (Respondent) (Withdrawn)

**1899-89-U:** Cyril Michael Scoon (Complainant) v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Workers, Local No. 647 (Respondent) v. Ind-Ex Distributors Ltd. (Intervener) (Dismissed)

**2152-89-U:** Randy R. Hope (Complainant) v. Service Employees International Union, Local 210 (Respondent) (Withdrawn)

**2189-89-U:** Teamsters Local 230 (Complainant) v. Custom Concrete (a division of St. Lawrence Cement Inc.) (Respondent) (Withdrawn)

**2761-89-U:** Clifford John Sanderson (Complainant) v. United Steelworkers of America, Local 2251 (Respondent) (Withdrawn)

**2876-89-U:** Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 141 (Complainant) v. Bruce W. Smith Building Materials Ltd. (Respondent) (Withdrawn)

**2911-89-U:** Linda R. Hall (Complainant) v. Women's Habitat of Etobicoke (Respondent) (Withdrawn)

**2955-89-U:** Canadian Union of Public Employees and its Local 3089 (Complainant) v. Corporation of the Township of Charlottenburgh (Respondent) (Withdrawn)

**3016-89-U:** John Vance, Glenn Ouellette, Al Fenton, Leonard Parsons, Jeff Parsons and Other employees of Collins & Aikman, A Division of WCA Canada Inc. (Complainants) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), John Cook, Jim Corbett, Dale Hammond, Randy Hildebrant (Respondents) (Withdrawn)

**3196-89-U:** Roger Pryor et al (Complainants) v. Local 6896 of the United Steelworkers of America (Respondent) v. Cliffs of Canada Ltd. (Intervener) (Granted)

**3283-89-U:** Wallace Clark (Complainant) v. Regional Municipality of Durham, and Canadian Union of Public Employees, Local 132 (Respondents) (Withdrawn)

**0018-90-U:** Mable McLeod (Complainant) v. Ms. Johnson, Mr. Longe, Mr. Marshal of the Restaurant Employees' Union, Local 75 (Respondent) v. Royal York Hotel (Intervener) (Dismissed)

**0024-90-U:** Edna Hodges and Donovan Miller (Complainants) v. International Ladies Garment Workers Union (Respondent) (Withdrawn)

**0055-90-U:** Labourers' International Union of North America, Local 183 (Complainant) v. York Condominium Corporation No. 456 (Respondent) (Withdrawn)

**0059-90-U:** Herburnt Harker (Complainant) v. Glass, Molders & Pottery Workers Union, Local '194' and Clare Brothers (Respondents) (Withdrawn)

**0060-90-U:** Isaac C. Smith (Complainant) v. United Brotherhood of Carpenters Lake Ontario Council (Respondent) v. Ontario Hydro (Intervener) (Dismissed)

**0068-90-U:** United Steelworkers of America (Complainant) v. Jireh Machseh Ltd. (Respondent) (Withdrawn)

**0098-90-U:** Teamsters Local Union No. 419 (Complainant) v. Brown & Collett Ltd. (Respondent) (Withdrawn)

**0133-90-U:** Scott Taylor (Complainant) v. C.A.W. (Respondent) (Withdrawn)

**0156-90-U:** Angelo Galiffi (Complainant) v. CAW (Respondent) (Withdrawn)

**0183-90-U:** Gary Carmichael (Complainant) v. Mr. P. Clancy (Respondent) (Withdrawn)

**0206-90-U:** L. Dennis Dezsi (Complainant) v. Murray G. Bulger Group (Respondent) (Dismissed)

**0219-90-U:** Josef Fras (Complainant) v. P. Clancy (Respondent) (Withdrawn)

**0221-90-U:** Ontario Public Service Employees Union (Complainant) v. Niagara Home for the Physically Disabled (Tanguay Place) (Respondent) (Withdrawn)

**0230-90-U:** Gabriella Robacer (Complainant) v. CUPE (Respondent) (Withdrawn)

**0261-90-U:** Community Lifecare Inc. c.o.b. as Community Nursing Home and Villa Fatima/Palais (Complainant) v. United Steelworkers of America (Respondent) (Withdrawn)

**0271-90-U:** Mr. Pranas Siulys (Complainant) v. Canadian Union of Public Employees, Local 3096 (Respondent) (Withdrawn)

**0284-90-U:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Complainant) v. Milne & Nicholls Ltd. (Respondent) (Withdrawn)

**0328-90-U:** Richard J. Hyland (Complainant) v. Burgess Wholesale (Respondent) (Withdrawn)

**0350-90-U:** Canadian Union of Public Employees, Local 2204 (Complainant) v. Rideau Employee/Student Child Care Centre, Ottawa Carleton School Day Nurseries Inc., Ottawa Board of Education, and F. Joanne Hunter (Respondents) (Withdrawn)

**0364-90-U:** Labourers' International Union of North America, Local 1081 and Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. D-K Construction Ltd. (Respondent) (Withdrawn)

**0368-90-U:** Janina Bezak (Complainant) v. Hotel Club, Restaurant & Tavern Employees Union, Local 261 (Respondent) (Withdrawn)

**0371-90-U:** Service Employees' Union, Local 183 (Complainant) v. Gibson Holdings (Ontario) Ltd. and Tim Gibson and Larry Gibson (Respondents) (Withdrawn)

**0398-90-U:** Association of Allied Health Professionals: Ontario (Complainant) v. Toronto East General & Orthopaedic Hospital (Respondent) (Withdrawn)

**0426-90-U:** Township of Charlottenburgh (Complainant) v. CUPE, Local 3089 (Respondent) (Withdrawn)

**0438-90-U:** Lewis Bennett (Complainant) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Respondent) (Dismissed)

**0475-90-U:** Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Intrepid General Ltd. (Respondent) v. Construction Workers, Local 53, CLAC (Intervener) (Granted)

**0478-90-U:** Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Complainant) v. Dundas - Jafine Industries Ltd. (Respondent) (Withdrawn)

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**0493-90-U:** Norman L. Courvoisier (Complainant) v. Nipissing Board of Education and C.U.P.E., Local 1165 (Respondents) (Withdrawn)

**0520-90-U:** Lindbergh A. Nelson (Complainant) v. United Rubber Workers and Dayco Products Ltd. of America, Local 906 (Respondents) (Withdrawn)

**0564-90-U:** Ontario Hydro Employees Union, CUPE, Local 1000 (Complainant) v. Ontario Hydro (Respondent) (Withdrawn)

**0569-90-U:** Donata Bruno (Complainant) v. Toronto Western Hospital (Respondent) (Withdrawn)

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**0578-90-U:** Labourers' International Union of North America, Local 183 (Complainant) v. Tsai Properties Inc. (Respondent) (Withdrawn)

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**0613-90-U:** Ontario Nurses Association (Complainant) v. Windsor Coalition for Development Health Care Associates (Respondent) (Withdrawn)

**0615-90-U:** Mike Benson (Complainant) v. U.F.C.W., Local 326W (Respondent) (Withdrawn)

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**0634-90-U:** IPCF Properties Inc. (Complainant) v. Sheet Metal Workers, Local 562 and Cliff Coffin (Respondents) (Withdrawn)

**0641-90-U:** Hotel, Motel & Restaurant Employees Union, Local 442 (Complainant) v. John Crothall Hospital Services (Respondent) (Withdrawn)

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**0699-90-U:** Operative Plasterers' & Cement Masons' International Association of the United States & Canada, Local 598 (Complainant) v. Toronto Structural Concrete Services Ltd., Labourers' International Union of North America, Local 183, Mike Reilly and Rocco Lotito (Respondents) (Withdrawn)

**0712-90-U:** International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Complainant) v. High-Reach Maintenance Ltd. (Respondent) (Withdrawn)

**0716-90-U:** Soheil Sharafabadi (Complainant) v. Ferro Industrial Products Ltd. (Respondent) (Withdrawn)

**0747-90-U:** Gilbarco Canada Ltd. (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Les Gillet, Marianne Webster and Arnold Baker (Respondents) (Withdrawn)

**0856-90-U:** Ontario Nurses Association (Complainant) v. Regional Municipality of Peel (Respondent) (Withdrawn)

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**3223-89-OH:** Jane Blythe (Complainant) v. Beatrice Foods Inc., Simcoe, Ontario (Respondent) (Withdrawn)

**0425-90-OH:** Martin Beausoleil (Complainant) v. Hyundai Auto Canada Inc. (Respondent) (Withdrawn)

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**1098-89-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Stone & Webster Canada Ltd. (Respondent) (Granted)

**1502-89-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Landmark Contracting Ltd. and Landmark Structures (Ontario) Ltd. (Respondents) (Dismissed)

**2068-89-G; 0713-90-G:** International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. A. Felice Aluminum Ltd. (Respondent) (Granted)

**2226-89-G:** Toronto Construction Association, General Contractors Section on behalf of V.K. Mason Construction Ltd., Ellis-Don Forming Ltd., PCL Constructors Eastern Inc. and Eastern Construction Company Ltd. (Applicants) v. The International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Respondent) (Withdrawn)

**2635-89-G:** The Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Fremor Masonry Ltd. (Granted)

**2639-89-G:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Stile Construction Ltd. (Respondent) (Withdrawn)

**2734-89-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. L. G. Barrett Electrical Company Ltd. (Respondent) (Granted)

**2763-89-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Ellis-Don Construction Ltd. (Respondent) v. The Operative Plasterers & Cement Masons International Association of the United States of America, Local 598 (Intervener) (Withdrawn)

**2817-89-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Power Pac Construction Co. Ltd. (Respondent) (Granted)

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**0196-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. 4 Star Drywall Ltd. (Respondent) (Withdrawn)

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**0395-90-G:** Labourers' International Union of North America, Local 1089 (Applicant) v. Brad Developments (Respondent) (Withdrawn)



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**0424-90-G:** Bricklayers Allied Craftsmen International Union, Local 6 Windsor and the Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Ambassador Marble & Tile Ltd. (Respondent) (Granted)

**0440-90-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. DiMarco Plumbing and Independent Plumbing and Hearing Contractors Association (Respondents) (Withdrawn)

**0498-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Hamilton Modular Building Inc. (Respondent) (Withdrawn)

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**September 1990**



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A Monthly Series of Decisions from the  
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**2841-88-JD** Millwright District Council of Ontario on its own behalf and on behalf of its Local 1244, Complainant v. **Acco Canadian Material Handling**, a Division of Babcock Industries Canada Inc. and Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, Respondents

**Construction Industry - Evidence - Jurisdictional Dispute - Board agreeing to receive employer and area past practice evidence of conveyer system installation - Board declining to admit evidence of past practice of other employers in other job assignments - Past practice and considerations of economy and efficiency are relevant to proper work assignment only if they can be tied to actual work in dispute**

**BEFORE:** *N. B. Satterfield*, Vice-Chair, and Board Members *D. A. MacDonald* and *S. Weslak*.

**APPEARANCES:** *N. L. Jesin*, *J. D. Watson* and *H. Martinak* for the complainant; *Fred Heerema* and *Anthony H. Allen* for Acco Canadian Material Handling, a Division of Babcock Industries Canada Inc.; *S.B.D. Wahl* and *F. Marr* for Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700.

**DECISION OF THE BOARD;** September 6, 1990

1. This complaint under section 91 of the *Labour Relations Act* was made by Millwright District Council of Ontario on its own behalf and on behalf of its Local 1244 ("the Millwrights") in response to a grievance of Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 ("the Ironworkers") filed against Acco Canadian Material Handling, a Division of Babcock Industries Canada Inc. ("Acco"). At the commencement of hearings into the merits of the complaint, the parties disagreed, amongst other things, about the description of the work in dispute, the kind of work about which the Board should hear evidence respecting Acco's past practice and the past practice of other contractors who employed either or both trades, and the geographic scope of the past practice evidence. The practice of the employer who has made the disputed assignment ("employer past practice") and of other employers ("area past practice") who have performed the work are two of several criteria considered by the Board in deciding work assignment disputes.

2. The Board heard the parties' submissions on these issues. The Millwrights took the position that the work in dispute was simply the installation of a monorail conveyor and, therefore, the Board should limit past practice evidence to evidence about the installation of monorail conveyors. The Ironworkers took the position that the issue between the two trade unions which underlies the complaint was much broader than the installation of monorail conveyor systems. It encompassed the installation of all types of material handling conveyor systems and the machinery and equipment associated with them. Therefore, according to counsel for the Ironworkers, the description of the work in dispute and the scope of past practice evidence had to be broad enough to accommodate the broader issue if the complaint was going to remedy this type of jurisdiction dispute. Acco took no position on the issues.

3. After considering the parties' submissions, the Board issued its decision in writing that the work in dispute was:

all work in connection with the installation of a monorail conveyor system

known as a monoveyor at the newly constructed Magna plant in Maidstone, Ontario.

4. With respect to employer and area past practice, the Board's decision was that it would receive evidence about the installation of two types of conveyor systems, monorail systems and package conveyor systems. For purposes of Acco's past practice, the Board's decision limited the evidence to jobs performed by Acco in the Province of Ontario, and for purposes of area past practice, the evidence was limited to jobs performed in the Counties of Essex and Kent (Board area #1). The Board directed the parties to exchange and to file with the Board the lists of jobs about which they intended to call evidence of employer and area past practice. The lists were to contain, as well, certain minimum information about the jobs.

5. Past practice evidence is only relevant to deciding the proper assignment of work in dispute if it can be tied in with the actual work in dispute. At the same time, the scope of past practice evidence should not be so narrow as to interfere with a party's full opportunity to present its evidence and make its submissions on the issue of the proper assignment. That raises the question of where is the sensible place to draw the line as to the past practice evidence to be heard. In the instant proceeding, in the Board's view, limiting past practice evidence to the two types of conveyor systems was that place. This is because the two systems include a sufficient variety of conveyors which might arguably be included in the term "monorail conveyor" so as to allow the parties full opportunity to present their evidence and make their submissions respecting the conclusions to be drawn by the Board from past practice evidence.

6. During examination-in-chief by counsel for the Ironworkers of the first of several contractors whom the Ironworkers expected to be calling to testify about jobs on their job list, counsel sought to adduce evidence about a job on the list which involved work on a bridge crane. Millwrights' counsel objected on grounds which included that the job did not involve the installation of conveyors in either of the two systems described above and, even if the Ironworkers were relying on the evidence for purposes of another criterion considered by the Board, economy and efficiency, and not for area past practice, the only relevant evidence was that respecting Acco's operations. Ironworkers' counsel submitted, amongst other things, that evidence of the economies and efficiencies of the way other employers have organized and utilized their work forces to install the two types of conveyor systems is relevant to the Board's assessment of the criterion of economy and efficiency. Moreover, counsel argues, evidence which would show that employers other than Acco who installed the two types of conveyor systems organized and utilized their work forces on all of their construction work in the same way as they do for installing the two types of conveyor systems, is relevant to the economy and efficiency criterion. He submits that the Board has recognized the relevance of the economies and efficiencies of employers other than the one who has made the disputed assignment. In that respect, he argues that *K-Line Maintenance & Construction Limited*, [1979] OLRB Rep. Dec. 1185 demonstrates that the Board analyzes the economies and efficiencies within the operations of each company which gives evidence in a work assignment complaint.

7. K-Line was an electrical contractor who employed members of the International Brotherhood of Electrical Workers, Local 353 to perform the work in dispute. The complainant Labourers' International Union of North America, Local 183 disputed K-Line's assignment to members of Local 353 although K-Line did not employ members of Local 183 or have any collective bargaining relationship with it. The decision does not disclose how many other employers gave evidence about how they performed the type of work in dispute. Therefore, the Board is not prepared to agree that the decision demonstrates a willingness of the Board to consider the economies and efficiencies of all employers who testify in a complaint. It is clear, however, that the Board did consider

evidence of two employers about the relative productivity of construction labourers and electrical workers performing the type of work in dispute. The two employers performed it with construction labourers, members of Local 183.

8. *Urban Consolidated Construction Corporation Ltd.*, [1977] OLRB Rep. Feb. 41 and *Tilechem Limited*, [1982] OLRB Rep. July 1074 are other examples of the Board considering evidence of the economies and efficiencies of employers other than the one who made the disputed assignment.

9. Were the Board to limit the evidence as argued by counsel for the Millwrights, in many complaints the Board would have no evidence on which to compare the relative economies and efficiencies of performing the type of work in dispute with, in the words of section 91 of the Act, "...persons in a particular trade union or in a particular trade, craft or class rather than [with] persons in another trade union or another trade, craft or class,...". If, however, the evidence is to serve that purpose, it must relate to the work in dispute.

10. In the instant complaint, the Board has said it will admit area and employer past practice evidence about the installation of the two types of conveyor systems. If consideration of economy and efficiency of other employers is to have any relevance to the work in dispute in this complaint, evidence going to that criterion must at least relate to those two systems. The Board is satisfied that evidence about how the contractor, who was testifying when this issue arose, organized his work force to perform work on bridge cranes on the job in question does not relate to those two systems. Therefore, the Board will not admit the evidence.

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**3171-89-R Christopher Clayton and Giuseppe Tocci, Applicants v. United Steelworkers of America, Respondent v. Benoma Metal Products Limited, Intervener**

**Petition - Termination - Petition circulated by brother-in-law of supervisor - Persons circulating petition having close working relationship with supervisor and living in same household - Petition not voluntary expression of employee wishes**

**BEFORE:** *Ken Petryshen*, Vice-Chair, and Board Members *D. G. Wozniak* and *E. G. Theobald*.

**DECISION OF VICE-CHAIR KEN PETRYSHEN AND BOARD MEMBER E. G. THEOBALD;**  
September 19, 1990

1. This is an application under section 57 of the *Labour Relations Act* in which the applicants, C. Clayton and G. Tocci, seek to terminate the bargaining rights held by the United Steelworkers of America.

2. The 2nd paragraph in a decision dated August 3, 1990 reads as follows:

2. At the conclusion of the hearing on August 1, 1990, the Board advised the parties that it would reserve its decision. After considering the evidence and the parties' submissions, the Board, with D. Wozniak dissenting, finds that it cannot be satisfied that the first set of petition documents filed in support of the application represent a voluntary expression of employee wishes. Since the majority's conclusion is based on Mr. Clayton's role in the securing of signatures on petition documents and the reasonable perception of employees, the same conclusion



would apply to the second set of petition documents filed by the applicants prior to the terminal date given the similar role played by Mr. Clayton in securing the signatures on those documents. Accordingly, this application is dismissed. The reasons for this decision will follow in due course.

The Board's reasons for the above finding are as follows.

3. For purposes of entertaining the evidence and representations from the parties, the Board held five days of hearing. C. Clayton, G. Tocci and A. Ayala were called to give evidence in support of the application. The respondent called L. Gans, S. Gill, H. Sidhu and J. Perguin to give evidence. O. Rintomaki was called to testify by counsel for the intervener. In making its factual determinations, the Board carefully reviewed all of the evidence and the parties' representations thereto.

4. The applicants filed two sets of petitions with the Board in connection with the application. The second set of petitions was obtained and filed with the Board when the applicants discovered the respondent was attempting to secure signatures on a counterpetition. As it turned out, the counterpetition filed by the respondent was not numerically relevant. At the outset of the proceeding, the Board determined, after entertaining representations from the parties, that it would firstly entertain the evidence and representations of the parties concerning the voluntariness of the first set of petitions filed with the Board and would later determine if it was necessary to hear evidence and representations concerning the voluntariness of the second set of petitions.

5. Clayton was the person who initially decided to make efforts to terminate the respondent's bargaining rights and he was able to obtain Mr. Tocci's assistance. The fact that Clayton assumed the role he did is not surprising since he represented the objecting employees when the respondent applied to be certified in 1987. The applicants filed with the application 31 petitions signed by employees expressing opposition to the respondent. Of the 31, Clayton witnessed 21 while Tocci witnessed the remaining 10. This initial set of petitions was secured between March 9 and March 20, 1990 and the Board heard a considerable amount of evidence concerning the manner in which the applicants obtained the signatures on the petitions. The respondent attacked the voluntariness of these petitions by pointing to Clayton's close connection with management and, in addition, the respondent attacked the petitions on other grounds which we find unnecessary to detail. As our decision of August 3, 1990 indicates the majority found merit in the respondent's position that Clayton's connection with management and how reasonable employees might perceive that connection should lead us to conclude that the signatures on the initial set of petitions were not placed there voluntarily. We note that we found no merit in the respondent's other positions concerning the manner in which the petitions were circulated and signatures obtained. With respect to the evidence of Mr. Gans concerning the events which occurred subsequent to the signing of the initial petitions, the Board finds in the circumstances that it is unnecessary to decide whether the evidence of those events would have had an impact on the voluntariness issue.

6. Before setting out the facts, it is useful to review the Board's general approach when confronted with deciding whether signatures on petitions have been placed there voluntarily. There is an onus on the applicant in a termination application to satisfy the Board on the balance of probabilities that the petition filed in support of the application represents a voluntary expression of employee wishes. When assessing the voluntariness of a petition, the Board has regard to the overall environment in the workplace as well as the responsive nature of the employer-employee relationship. The Board will not give any weight to a petition where someone in a management capacity has been involved in the origination or circulation of a petition. But even if management is not involved, the Board will still give the petition no weight where the evidence demonstrates that the manner in which the document was prepared or circulated would lead rea-

sonable employees to conclude that management was involved in the petition or might become aware of who did or did not sign the document. The impact on employee wishes is the same when management has a direct involvement or when employees simply perceive that management is involved.

7. Support for the preceding observations in a certification context can be found in *Radio Shack*, [1978] OLRB Rep. Nov. 1043, where the Board made the following comments at paragraph 24:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16,264 in the following terms:

In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represent a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

8. The Board recognizes that there is a difference between petitions filed in a certification context and those filed in support of a termination application, such as we have before us. In *Ontario Hospital Association Blue Cross*, [1980] OLRB Rep. Dec. 1759, the Board stated the following at paragraph 31:

The sole issue before the Board in every case regarding a "petition" is the voluntariness of the acts of signing. The Board has often drawn a distinction between petitions which are filed in connection with an application for certification, and those which accompany an application for termination of bargaining rights. In the former case, the Board has said that it must be sensitive to the role which management influence, devious or otherwise, may have played in causing employees who have only recently signed a card in support of a union to subsequently sign a petition which *opposes* the union. In the case of a termination application, the Board is not less concerned about influence by the employer, but there may, as a practical matter, be any number of reasons, including the mere passage of time, to readily explain the employees' apparent change of hearts. As the Board commented in *N. J. Spivak Limited*, [1977] OLRB Rep. July 462:

In contrast to a statement filed in opposition to an application for certification a state-

ment of desire filed in support of a termination application under section 49 (now 57) of the Act does not represent a sudden change of heart by those who sign it. The operation of section 49 (now 57), a section designed to give vent to employee desires, requires the passage of at least one year from the date of the union's certification before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49 (now 57), the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application under section 49 (now 57) of the Act.

9. Although the Board is less inclined to draw negative inferences in a termination application where there is no "sudden change of heart" than it would be in a certification proceeding, the Board's task is still to "protect the fundamental rights of employees to make their own choice, as distinct from the choice of their employer, in the matter of selecting or rejecting a bargaining agent". *Peel Block Co. Ltd.*, 63 CLLC ¶16,227. The Board must still be satisfied that when employees signed a petition in a termination context, they were not influenced by a concern that management would become aware of who signed the petition.

10. As one might expect, the parties had different positions concerning what the Board should do with the evidence of Clayton's relationship to management. Counsel for the intervener filed the following three decisions of the Board which address the issue: *Otto's Deli*, [1980] OLRB Rep. Nov. 1673, *Labatt's Ontario Breweries*, [1985] OLRB Rep. March 433, and *Domus Building Cleaning Co. Ltd.*, [1986] OLRB Rep. March 319. These cases indicate that a special relationship, whether it be familial or of some other variety, between a bargaining unit employee who is involved in the circulation of a petition and a member of management is a relevant factor when considering whether a petition represents a voluntary expression of employee wishes. The cases indicate as well that the weight to be attached to this factor depends on the facts in each case.

11. Clayton, who has been employed by the intervener since 1983, is the brother-in-law of Brian Da Silva, the supervisor in the shipping department. In and of itself, such a relationship between these two might not raise a concern with respect to the voluntariness of the petitions. However, in addition to the relationship between Clayton and Da Silva, the evidence disclosed that Clayton works in the same department as Da Silva and is accordingly supervised by Da Silva. The uncontradicted testimony of S. Gill is that Clayton takes over Da Silva's duties when Da Silva is absent. As one might expect, Clayton and Da Silva have a close working relationship and Clayton is often during the course of the work day talking with Da Silva in Da Silva's office. In addition to these factors, Da Silva and Clayton live in the same household in Brampton. These items that are characteristic of the relationship between Clayton and Da Silva are well known to bargaining unit employees.

12. Clayton testified that he and Da Silva never discussed his efforts to terminate the respondent's bargaining rights and his evidence in this regard is uncontradicted. The fact that Da Silva or any other person in management was not involved with or had any discussion with Clayton concerning his petition activity does not eliminate the concern. The factors referred to above suggest that reasonable employees who were asked to sign a petition by Clayton or who knew Clayton was involved in the termination effort would likely have a concern that management would become aware of those persons who did not sign a petition. In addition to those factors considered above, it was argued that one must take into account what occurred during the certification process and the fact that the respondent in this application was unable to secure a sufficient number of signatures on its counterpetition to make it relevant. The majority has considered these factors as well but still find that we could not be satisfied, given Clayton's relationship to management, the role he



played in the termination application and the reasonable perception of bargaining unit employees, that the petitions represented the voluntary expression of the wishes of those employees who signed them. As noted in the decision of August 3, 1990, the same conclusion would apply to the second set of petitions given Clayton's role in securing those documents.

**DECISION OF BOARD MEMBER D. G. WOZNIAK; September 19, 1990**

1. I cannot agree with the decision of the majority in this matter.
  2. My dissent is based on the evidence of Christopher Clayton whom the majority found had not satisfied them that the petitions filed with the application represented a voluntary expression of employee wishes. In my opinion, Clayton was a credible witness and very knowledgeable about the requirements of the *Labour Relations Act*, having been involved in representing a group of objecting employees when the Union was certified in 1987.
  3. The majority felt that the fact that Clayton resided in the same residence as his brother-in-law Brian DaSilva, the supervisor of the Shipping Department, and that Clayton works in the same department and under the supervision of DaSilva and appears to have a "special relationship" with him such as taking over his duties when he was on vacation, etc. raised questions about the voluntariness of the petitions. The latter circumstances are understandable when it is realized that Clayton worked in the department for 7 years and that it was an entry department for new employees; it is not surprising therefore that he would have a "special relationship". All of these circumstances were well known to all bargaining unit employees and there was no evidence offered by the Union that they influenced employees when Clayton solicited their signatures on not one but two petitions.
  4. For these reasons, I would not find the petitions tainted and would have supported a decision directing a representation vote.
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**0748-90-OH Doug McFadden, Complainant v. Blenkhorn & Sawle Ltd., Respondent**

**Health and Safety - Employer believed employee was spending an excessive amount of time on health and safety activities - Belief was a part of employer motivation in deciding to include employee in a layoff - Board ordering reinstatement and compensation**

**BEFORE:** K. G. O'Neil, Vice-Chair, and Board Members W. Gibson and J. Redshaw.

**APPEARANCES:** Jerry Raso and Doug McFadden for the applicant; Donald Carr and Sherman Arnold for the respondent.

**DECISION OF THE BOARD; September 19, 1990**

1. This is a complaint under section 24 of the *Occupational Health and Safety Act* (sometimes referred to below as the OHSA).
2. Douglas McFadden, the complainant, has been a journeyman sheetmetal worker for 25



years. His experience includes 16 years as a superintendent and four and a half years as a foreman with sheet metal firms. He was laid off on May 3, 1990 by the respondent (Blenkhorn), a sheet metal subcontractor on a project constructing a new distribution centre for Canadian Tire in Brampton, Ontario. The reason given was shortage of work. Mr. McFadden believes that the actual reason was, at least in part, annoyance with his activities as a health and safety representative and co-chair of the joint health and safety committee.

3. Donald Carr, senior vice-president, of the employer as well as Sherman Arnold, the foreman who made the decision to lay-off Mr. McFadden, gave evidence on behalf of the employer. John Collins, a sheet metal worker business agent, Greg Mitchell, a sprinkler fitter, and the complainant gave evidence in support of the complaint. We have summarized the salient parts of the evidence below.

4. On May 1, 1990, Blenkhorn was advised by its general contractor that an area in the project known as Area 14 was on hold until further notice. Mr. Arnold said that the reason for this was the impending strike of the electricians which would prevent the area being electrically lit. On the other hand, Mr. Carr said the reason was that the consulting engineers had not yet made a decision as to what to do with part of the conduit that Blenkhorn was to install. Mr. McFadden maintains that there was plenty of other work to do, some crews were already working in Area 14 with portable lighting, and that the layoff was unnecessary. Mr. Carr testified in reply that, by the date of the hearing, the work mentioned by Mr. McFadden had still not been done.

5. Mr. Arnold, the foreman, has control of hiring and firing on the site. He first hired Mr. McFadden on December 4, 1989, making Mr. McFadden the second employee of the respondent on the Canadian Tire site. There were two layoffs in December and Mr. McFadden was last re-hired on January 22, 1990. Up until that time, Mr. McFadden testified there had been no complaints about his work, and Mr. Arnold had expressed pleasure that he was returning after the December layoffs.

6. Mr. McFadden's involvement with health and safety on the Canadian Tire site started when Mr. Arnold asked him to represent the company on a voluntary health and safety committee set up by the general contractor's safety coordinator. Various unions decided that this committee should be boycotted and later a joint health and safety committee was set up to which Mr. McFadden was appointed by the union side. Starting with a meeting of the voluntary health and safety committee, and continuing through the joint committee, Mr. McFadden took an active part in health and safety meetings which dealt with a large number of items.

7. Mr. Arnold was away on holidays between March 12 and 16, 1990. During this period of time Mr. McFadden exercised his right to refuse work under section 23 of the OHSA. The issue during this work refusal was carbon monoxide fumes from machine engines running inside the structure which had been enclosed for winter construction. On March 12, when Mr. McFadden initiated the work refusal, the air was "very smoky" and there were no exhaust fans. The Ministry did not take readings until the following day, when the conditions were much better. The ventilation was on, the doors were open, the bulldozers were parked, no concrete was being poured and no vehicles were moving. The level of carbon monoxide was still over twice the permissible standard, and orders were issued.

8. Upon Mr. Arnold's return from vacation, he was led to believe by the Acting Foreman and others that Mr. McFadden had not done any regular work during his week of vacation, but had spent all his time on health and safety matters. He was concerned about it, and spoke to Mr. McFadden, who denied that he was not on the job. However, it was clear later in his evidence that Mr. Arnold felt Mr. McFadden had spent an excessive amount of time on health and safety in his

absence. Mr. McFadden's uncontradicted evidence was that he and his crew finished all the work that the foreman had left during his vacation, despite the time he spent on the work refusal.

9. On March 20, 1990, Mr. McFadden became workers' chair of the health and safety committee, and thus co-chair of the joint health and safety committee, replacing the previous chair who had been fired. At the same time he became union steward. Mr. Arnold testified that when he heard of the possibility of this that he told Mr. McFadden that personally he would rather if he was not co-chairperson because Blenkhorn was one of the smallest contractors on the site. However, he maintained that he had left it up to Mr. McFadden to decide and that this did not play a part in his decision to lay him off. Mr. McFadden said that this conversation also included a statement by Mr. Arnold that if he did take on the above responsibilities the employer would have to find ways to remove him, that the company did not want the responsibility of paying for a safety chair. Mr. Arnold denies this.

10. On April 12, Mr. McFadden spent the first hour of the work day trying to find an agenda for the health and safety meeting he was to attend later in the morning. When he returned to the work site, Mr. Arnold confronted him, saying that they started work at 7:30 and asking him if he remembered "our talk". Mr. Arnold says this referred to a conversation they had had about his being hired as a sheetmetal worker. Mr. McFadden says it relates to the conversation in which Mr. Arnold cautioned him about becoming Chair of the health and safety committee. Mr. McFadden called Mr. Collins on that day to complain that his foreman had complained he was spending too much time on health and safety matters.

11. On April 16, Mr. McFadden participated in a health and safety job-walk through the work place. On April 26, 1990 Mr. McFadden again called in the Ministry of Labour, this time on an issue related to propane bottles and standing on work boxes on scissor lifts. Mr. McFadden's participation in the ensuing inspection took him away from his regular job duties between 12:30 and 3:50 after which it was too late to get out his tools. Mr. Arnold says he was not upset about this; it was part of Mr. McFadden's job as a safety rep. On the same day, Mr. McFadden, in his role as union steward, talked to Mr. Arnold about a work jurisdiction problem. At the end of the day Mr. McFadden asked Mr. Arnold's permission to use the phone. Mr. Arnold's response was "Yes, you haven't worked all day, why start now?" Mr. Arnold testified that he felt that Mr. McFadden was spending an excessive amount of time making calls as steward. Mr. McFadden maintains that he only made phone calls on one occasion (3 calls), relating to a work jurisdiction problem. He also mentioned using the phone in his role of health and safety representative on other occasions.

12. On April 30, 1990, Mr. McFadden asked Mr. Arnold about putting platforms on the scissor lifts, and Mr. Arnold said they were not necessary, despite the fact that the Ministry had left an order on April 26, directing that they be used. Mr. Arnold said that Mr. Callan had said this was okay when he went to check out what the "write-up" from the Ministry had said. Mr. McFadden describes Mr. Arnold as very upset, which Arnold denies. Shortly after this, likely on the same day, Mr. Arnold had a conversation with Mr. Collins, the Business Agent, in which Mr. Arnold informed Mr. Collins that he wanted to replace Mr. McFadden on the job, but maintains he meant only as a union steward, not as a health and safety representative. On May 2, Mr. Collins came to the job site to discuss this with Mr. Arnold. We accept Mr. Collins testimony that during this discussion, Mr. Arnold complained about the amount of time that Mr. McFadden spent on health and safety and steward duties, and that it was interfering with his job as sheet metal worker. However, Mr. Arnold gave no specific reason to Mr. Collins for wanting to replace Mr. McFadden but expressed general dissatisfaction with his performance.

13. On May 3, 1990, after having asked Mr. McFadden for a copy of the collective agreement, and having read the clause which gives the conditions under which stewards may be laid off, he gave Mr. McFadden and three others lay-off notices. He read the part about laying off stewards because he did not know if he was allowed to lay off the steward. He retained four people, one of whom had been hired two weeks earlier, and another a month before.

14. Mr. Arnold testified that he fired Mr. McFadden on May 3rd because a cut back was required due to the inability to work in Area 14, and he felt those he kept were the best men to do the work they had. He stated that sometimes Mr. McFadden wandered off or stood around with his hands in his pockets. In answer to this Mr. McFadden says that he and his partner were used as examples of good workers when two other employees were hired. The employer's evidence indicates these two employees were hired on April 2, 1990. On July 9, 1990, Mr. Arnold called the union asking for two more workers, was offered Mr. McFadden, among others, and refused to accept him.

15. Mr. Carr testified as to the reasons for the lay-off itself but made it clear that senior management played no role in the choice of individuals to be laid off. He also emphasized that health and safety were prime company concerns.

16. As the Board has consistently held, the employer's onus in cases such as this is to establish that no part of the reason for the action taken against the employee was that the employee had acted in compliance with the OHSA or sought its enforcement. For a recent example, see *W.C. Wood Co. Ltd.*, [1990] OLRB Rep. Jan. 105. We have little hesitation in concluding in this case that at least part of Mr. Arnold's motivation for choosing Mr. McFadden as one of the people to be laid off was the amount of time he was spending on legitimate health and safety activities. Mr. Arnold candidly admitted that he had told Mr. McFadden that he did not think he should take on the duties of health and safety chair, given the size of the employer. His testimony as to why Mr. McFadden was laid off did not convince the Board that similar considerations were not in his mind when he made the decision to let Mr. McFadden go. On the contrary, the evidence established that Mr. Arnold was unhappy with the amount of time spent on health and safety activities and said so the day before he laid Mr. McFadden off. His reactions to Mr. McFadden's health and safety activities during his vacation and on his return were negative. The employer's evidence did not challenge Mr. McFadden's evidence that no problems with his work had been pointed out prior to the lay-off, or that he had been cited as a model employee as recently as April. At the time of his lay-off, Mr. McFadden had twenty-five years experience as a sheetmetal worker. The fact that there was no lay-off by seniority requirement in the collective agreement is not a sufficient answer to the allegations in this matter. When an employee of Mr. McFadden's experience and previous performance is laid off on the heels of health and safety activity which had received the negative reaction recounted above, a more cogent explanation than that given by Mr. Arnold is necessary to discharge the reverse onus on the employer that no part of the discharge was because of the employee's having acted in compliance with, or sought the enforcement of, the OHSA. The complaints about Mr. McFadden's performance were vague and unconvincing. The only specific evidence of Mr. McFadden's not performing his regular duties while at work was evidence of health and safety activities aimed at enforcing the OHSA.

17. The employer argued as part of its case that it had a model safety record. This may well be true, and it may be equally true that senior management had no improper role in the layoff of Mr. McFadden. However, the evidence was clear that the foreman had sole control over the choice of people to lay-off and did not dislodge the evidence indicating anti-safety motivation in the choice of Mr. McFadden as one of them to be laid off.



18. It is not necessary in this case to determine whether or not the lay-off was necessary, as the union invited us to do. Whether or not the lay-off was necessary, we are of the view that the choice of Mr. McFadden as one of the people to be laid off involved, at least in part, considerations contrary to the OHSAA.

19. Given our findings above, it is unnecessary to address the union's argument that Mr. Callan, who is not an employee of Blenkhorn, played a significant role in the discharge of Mr. McFadden.

20. In the result, the complaint is allowed. Mr. McFadden is to be reinstated and compensated for his losses due to the lay-off. We will remain seized if the parties are unable to agree on the quantum of compensation owed.

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**0967-90-U United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800, Complainant v. Bonik Incorporated, Respondent**

**Duty to Bargain in Good Faith - Unfair Labour Practice - Employer demanding that union supply information on its membership procedures before he would meet with it - Failure of union to provide information not relieving employer of obligation to bargain in good faith**

**BEFORE:** *Bram Herlich*, Vice-Chair, and Board Members *W. A. Correll* and *E. G. Theobald*.

**APPEARANCES:** *A. J. Ahee* and *M. Zangari* for the complainant; *Bob Nikolic* for the respondent.

**DECISION OF THE BOARD;** September 21, 1990

1. This is a complaint under section 89 of the *Labour Relations Act* alleging the respondent (also referred to as the "employer") has violated section 15 of the Act.

2. In an oral ruling delivered on September 10, 1990 the Board declared that the employer had failed to bargain in good faith and make every reasonable effort to make a collective agreement contrary to section 15 of the Act. The Board also directed the employer to meet with the trade union forthwith and to bargain in good faith and make every reasonable effort to make a collective agreement. These are our reasons for that ruling.

3. By certificates dated April 11, 1989, the applicant obtained bargaining rights for the respondent's employees in the ICI sector (not material in the present complaint) and for "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Bonik Incorporated in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". For ease of reference (if not accuracy) these latter bargaining rights and the corresponding bargaining unit will be referred to as "residential".

4. Initially, the union took the position that in respect of residential bargaining rights and by virtue of the certification, the employer was bound by the terms of the union's "provincial"



(ICI) agreement since the latter apparently includes terms and conditions relating to the residential sector. From the evidence before us it would appear that the employer, or at least its then counsel may have concurred in this view. Indeed, it would appear that an application (in Board File 1643-89-G) under section 124 was filed asserting that position. That application was ultimately withdrawn. Shortly thereafter on March 22, 1990, the union served the employer with notice to bargain in respect of its residential bargaining rights pursuant to section 14 of the Act and suggested several possible meeting dates.

5. By letter dated April 14, 1990, Bob Nikolic replied on behalf of the employer asserting that a reply to his earlier letter of October 16, 1989, was a condition precedent to any meeting with the union. The letter referred to was a brief request for "detailed particulars in order to join your union".

6. There then followed an exchange of correspondence culminating in Mr. Nikolic's letter of July 9, 1990. It is not necessary to review this correspondence in detail, it is sufficient to observe that the parties continued to restate their positions i.e. the union continued to attempt to arrange negotiating meetings and Mr. Nikolic continued to refuse to respond until he received a reply to his letter of October 16, 1989.

7. How, whether, or, indeed, why Mr. Nikolic might become a member of the applicant is of little interest to this Board in the context of the present complaint. In any event the union's inability or refusal to provide Mr. Nikolic with the information he was seeking does not relieve the employer of its obligation to bargain in good faith under the Act.

8. It is difficult to contemplate a more fundamental or blatant violation of the duty to bargain in good faith than in the present case. Notwithstanding four separate written invitations from the union over a period of 4 months, the employer has consistently failed or refused to make any arrangements to set up or attend any collective bargaining sessions. Unless the employer recognises and accepts the labour relations duties and obligations imposed by law, we fear that it may not be long before these parties are forced to return to the Board for further litigation.

9. It was for these reasons that we issued our oral ruling on September 10, 1990.

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**2969-89-M The Ontario Secondary School Teachers' Federation, Applicant v. The Carleton Board of Education, Respondent**

**Employee Reference - Employee status of psychologists employed by school board - Exercise of professional responsibilities which may include some professional supervision of other employees does not preclude being an employee for the purposes of the Act - Board finding individuals to be employees within meaning of Act**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair, and Board Members *M. Rozenberg* and *K. Davies*.

**APPEARANCES:** *Sherry Liang* for the applicant; *J. H. Yeo* and *A. J. Beer* for the respondent.

**DECISION OF THE BOARD:** September 4, 1990

1. This is an application, under section 106(2) of the *Labour Relations Act*, for a determination of whether Petra Duschner and Maggie Mamen, both of whom are classified by the respondent as "Psychologists", are "employees" within the meaning of the Act.

2. In accordance with the usual practice in such applications, the Board authorized a Labour Relations Officer to inquire into and report to it with respect to the individuals whose "employee" status is an issue. Pursuant thereto, a Labour Relations Officer convened a meeting of the parties at which each was given an opportunity to be heard and to introduce evidence. As it turned out, the parties agreed that they would proceed on the basis that the testimony of Ms. Duschner would be representative of the duties and responsibilities of both herself and Ms. Mamen for purposes of this application. Ms. Duschner was the only witness to testify. Her testimony was transcribed in the Officer's Report to the Board, which report was circulated to the parties for their comment. Subsequently, at the applicant's request, the Board convened a hearing at which it received the representations of the parties with respect to the matter.

3. The issue between the parties is whether Ms. Duschner and Ms. Mamen exercise functions which result in them being deemed not to be employees for purposes of the Act by reason of section 1(3)(b).

4. We find it unnecessary to embark upon an exhaustive review of the Board's jurisprudence in this area. Suffice it to say that when the Board is faced with this issue, it examines the duties and responsibilities of the individuals in question as a whole within the context of the employer's business and structure. The Board assesses the extent to which the individuals in question exercise duties or responsibilities which affect the job security or economic position of other persons such that they are incompatible with them for collective bargaining purposes (see *Caledon Hydro-Electric Commission*, [1979] OLRB Rep. Oct. 924; *Corporation of the Township of West Lincoln*, [1981] OLRB Rep. April 436; *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121; *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84).

5. As Psychologists, Ms. Duschner and Ms. Mamen are employed in the respondent's Educational Services (Special Education) department. By decision dated December 27, 1989, the Board certified the applicant as the exclusive bargaining agent for

all employees of the respondent in the Educational Services (Special Education) department in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, office and clerical staff and employees in the bargaining units for which any trade union held bargaining rights as of November 10, 1989.

Ms. Duschner perceives her responsibility to be to provide professional supervision to non-registered psychological personnel; namely, Psycho-educational Consultants and Psychometrists. The evidence reveals that Ms. Duschner and Ms. Mamen have no power to hire, fire, or otherwise discipline anyone. They are not involved with employee attendance, vacations, or other leaves of absence. They do exercise some supervision over office staff (that is, secretaries employed in the department) but the precise nature of this is unclear and this office staff is not in the bargaining unit in question in any event. The only function performed by Ms. Duschner and Ms. Mamen which even remotely suggests that they operate in some managerial capacity is the annual evaluation they perform of employees to whom they provide professional supervision. This evaluation includes providing an opinion with respect to whether or not a salary increment should be granted to the employee being evaluated. However, although the respondent's representative submitted that these recommendations are always followed, there is no evidence whatsoever with respect to what use is made of these evaluations or what impact they have on employees evaluated by Ms. Duschner or Ms. Mamen. The only evidence before the Board in that respect is that Ms. Duschner

does not perceive that she has any effective power in that respect and that she is even unaware of the respondent's salary structure.

6. When dealing with a professional context, it can be difficult to distinguish professional from managerial functions as the latter term is commonly applied in a typical office or industrial setting. Nevertheless, there is a distinction between the two. The evidence in this case suggests that Ms. Duschner and Ms. Mamen are highly qualified individuals with important responsibilities and that they play a significant role in the respondent's business of providing educational services. However, the mere fact that an individual exercises professional responsibilities, which may include some professional supervision of other professionals does not mean that that individual cannot be an employee for purposes of the *Labour Relations Act* (see *Spar Aerospace Products Ltd.*, [1979] OLRB Rep. July 700; *Ottawa General Hospital*, [1984] OLRB Rep. Sept. 1199; *Kitchener-Waterloo Hospital*, [1986] OLRB Rep. May 651).

7. In the result, having regard to the evidence before the Board, we are satisfied that Ms. Duschner and Ms. Mamen do not exercise any duties or responsibilities which have any more than an incidental impact on other employees in the bargaining unit. We therefore find that Ms. Duschner and Ms. Mamen are employees within the meaning of the *Labour Relations Act*.

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**2369-89-U Douglas Dorling, Complainant v. Ontario Public Service Employees Union (James Clancy) and Ontario Public Service Staff Union (Ms. Sherry Currie), Respondents**

**Parties - Practice and Procedure - Reconsideration - Settlement - Complainant making second reconsideration request on basis that mental illness had deprived him of the capacity to make a settlement - Board directing matter be scheduled for hearing to allow complainant to show why earlier decision permitting withdrawal of complaint should be reconsidered**

**BEFORE:** *Robert Herman*, Vice-Chair, and Board Members *D. A. Patterson* and *M. Rozenberg*.

**DECISION OF THE BOARD;** September 5, 1990

1. This is the second request by the complainant for reconsideration of the Board's decision of February 14, 1990. In that decision the Board gave leave that the complaint be withdrawn, having regard to the settlement which had been reached by the parties.

2. In its decision of March 8, 1990, the Board denied Mr. Dorling's first request for reconsideration of the above-noted decision.

3. In a letter dated June 22, 1990, received by the Board on July 9, 1990, the complainant again asked for reconsideration, although on different grounds than his first request. As he writes, in part, in that letter:

I would be asking for reconsideration on the following basis, due to my mental incapacity owing to the illness I had I was entitled under the *Mental Health Act* to have a representative present to represent me. My doctor planned to attend as he was concerned for my health and I had anticipated an adjournment until I was able to get legal aid approved. Enclosed is the latest research data concerning my illness ...



4. His request was circulated to the parties for their comments. In response, the Board received a letter of July 30, 1990, from counsel for the employer, OPSEU, opposing the reconsideration. That letter reads, in its entirety, as follows:

I act for OPSEU the employer in connection with the above-noted matter. Mr. Dorling has already made a request for reconsideration to the Board that was rejected by written decision. Legal proceedings such as these must have some finality and the Board should not be in the position of considering a second request for reconsideration so recently after a request has been made and refused.

Mr. Dorling resigned voluntarily from employment with OPSEU and received a substantial severance package.

Just prior to the hearing scheduled to hear this complaint earlier this year Mr. Dorling withdrew his complaint against his bargaining agent the Ontario Public Service Staff Union. It is unclear whether he is seeking a reconsideration of that withdrawal as well as his withdrawal of his complaint against the employer.

Under the terms of the withdrawal of the complaint OPSEU undertook, inter alia, to make its best efforts to have three individuals who had launched lawsuits against Mr. Dorling for alleged defamatory and libelous statements made by Mr. Dorling to withdraw them. OPSEU was unsuccessful in convincing one of the three individuals who had launched actions against Mr. Dorling to withdraw her action.

The one individual who is suing Mr. Dorling, Ms. Bridget Krajnak, has made it clear on the record that she would currently abandon her action on a without costs basis if Mr. Dorling would make a written retraction of the statement(s) he made about her.

Mr. Dorling is represented by a solicitor in that action. The gist of Mr. Dorling's current complaint seems to relate to this lawsuit. The matters Mr. Dorling raises are issues in the litigation. Accordingly the forum, if one is available, for the resolution of his current complaints resides with the courts.

5. The Board was also in receipt of numerous letters supporting his complaint. The Board was also sent a copy of a medical report, dated August 3, 1990, with respect to Mr. Dorling.

6. It appears from Mr. Dorling's letter of June 22, in which he requests reconsideration, that he is seeking reconsideration on the basis that he was so mentally incapacitated at the time he agreed to and signed the settlement that he was unable to properly represent himself, and the settlement ought therefore to be set aside.

7. In these circumstances, the Board considers it appropriate to schedule this matter for hearing, to provide an opportunity to the complainant to demonstrate to the Board why its earlier decision (in which it gave leave that the complaint be withdrawn) should be reconsidered, on the grounds asserted, the complainant's mental incapacity at the relevant time. The hearing will not deal with the merits of Mr. Dorling's section 89 complaint, but only with whether the Board ought to reconsider and afford him an opportunity to address the merits of his section 89 complaint. The parties should be prepared to lead whatever evidence they consider relevant to this reconsideration issue. Given the grounds he asserts in support of his reconsideration request, Mr. Dorling should understand that he has the obligation of establishing on the evidence that he was sufficiently mentally incapable at the relevant time, and that in all the circumstances the settlement ought to be set aside.

8. Accordingly, this matter is to be scheduled for a hearing to consider whether the Board ought to reconsider its earlier decision. This panel is seized.

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**0461-90-G** Ontario Allied Construction Trades Council; International Union of Operating Engineers; International Union of Operating Engineers, Local 793, Applicants v. **Electrical Power Systems Construction Association**, Ontario Hydro, Respondents

**Construction Industry - Construction Industry Grievance - Evidence - Practice and Procedure - Party seeking production of documents through a summons need not demonstrate any more than that the documents sought are arguably relevant to the matters at issue - Board not requiring immediate production of large volume of documents of uncertain relevance - Applicant free to pursue demands for any of these documents at a later point in proceedings where relevance and probative value established**

**BEFORE:** *N. B. Satterfield*, Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballentine*.

**APPEARANCES:** *S. B. D. Wahl*, *J. Kennedy* and *B. Austin* for the applicants; *Harvey Beresford*, *V. P. Johnston*, *V. W. Medri* and *Bruce H. McPherson* for the respondents.

**DECISION OF THE BOARD;** September 25, 1990

1. The applicant has referred a grievance in the construction industry concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 124 of the *Labour Relations Act*.

2. The grievance alleges that Beverly Austin has been dismissed without just cause. Austin had been employed as a crane operator by the respondent, Ontario Hydro, at its Darlington Generating Station. His employment was terminated effective April 5, 1990 as a result of an incident which occurred on March 20th.

3. The respondent's grounds for terminating his employment are set out in a letter to the grievor dated April 5, 1990 from W. W. Gundry, the respondent's Mechanical Superintendent at Darlington. It states as follows:

RE: TERMINATION OF EMPLOYMENT

This will confirm the termination of your employment for cause effective April 5, 1990.

Your employment is being terminated due to your failure to follow proper and safe crane operating procedures leading to the upset of a 100 ton Grove Mobile Crane.

You will not be considered eligible for rehire at Darlington G.S.

4. The burden of proof in this grievance rests with the respondent and, in the ordinary course, such proof would be confined to the grounds for discharge set out in the letter. That means that Ontario Hydro will have to prove the factual basis of the grounds for discharge as set out in the letter and, if proven, establish whether those grounds are just cause for discharge.

5. A short time before this application came on for hearing by the Board, both counsel caused a summons *duces tecum* to be issued, directed to representatives of the party opposite. Counsel for the applicant had its summons served on Mr. H. Zuzek, Manager of Construction for Ontario Hydro. Counsel for Ontario Hydro attempted service of a summons on Mr. Joseph Kennedy, Business Manager of the applicant, but was unsuccessful in doing so through no fault of Mr.

Kennedy. Both counsel objected to the demands in the summons of the other party for the production of documents.

6. The summons served on Mr. Zuzek requires him to attend before the Board and bring with him "all documentation, records and materials relating to the [grievance], including but not limited to, ...":

- (1) all foremen's, general foremen's, supervisors' and managers' reports with respect to the accident;
- (2) all records, disciplinary or otherwise, and reports with respect to the maintenance and operation of all cranes including but not limited to cranes involved in upset incidents including but not limited to all mobile carrier cranes including but not limited to the 100-ton Grove carrier cranes at the Darlington site and at all other Ontario Hydro installations throughout the Province of Ontario;
- (3) the physical production of the "positive cab lock dog" which was replaced after the accident and production of the "replacement dog";
- (4) Ontario Hydro Foreman's Handbook, Generating Stations Division;
- (5) Ontario Hydro policy manuals or directives concerning the imposition of and duration of disciplinary penalties including but not limited to No Rehire policies.

7. The summons which respondent counsel attempted to serve on Mr. Kennedy sought to have him attend at the Board and bring with him:

- (1) all documents, descriptions, materials and written information pertaining to any and all training programs and courses for crane operators or crane operation of any type or description taught, given, sponsored or contributed to by members of the International Union of Operating Engineers, Local 793;
- (2) all documents, records and materials relating to any such training or participation in any such training by Beverly Austin;
- (3) all documents, records and materials pertaining to Beverly Austin generally and any showing his places of employment, the names and addresses of his employers, the nature of the work performed by Beverly Austin for such employers, the discipline records for him at each place of employment and any documents or records of any discipline received by Beverly Austin at any place of employment; and
- (4) any documents or records of any incidents involving Beverly Austin in connection with the operation of cranes during the time he has been a member of the International Union of Operating Engineers, Local 793.

8. Respondent counsel did not object to the production of all of the documents sought in the applicant's summons and agreed to produce a substantial part of the documents and material demanded in items 1, 3, 4 and 5. He focused his objection primarily on the documents in group 2. He contended that the demand to produce these documents was an attempt at the production of documents on discovery, a procedure not available in proceedings under the *Labour Relations Act*, both generally and pursuant to the arbitration of grievances under section 124 of the Act; that the material sought was not relevant to the issues of the grievance; and, that the demand amounted to a "fishing expedition" to see whether the applicant had a case at all. Counsel argued further that, since there is no discovery process in the Board's proceedings, he had to know at the outset whether the Board was going to find the documents sought to be relevant in order to know the case which he had to meet. For, were the Board to find them to be relevant, he would want to deal with the documents in his case-in-chief and not as part of the applicant's case-in-chief. Counsel submits



that, if the Board does not decide the relevance of the documents sought at the commencement of the case, he would have to prepare to call a substantial volume of evidence which later may be found not to be relevant.

9. Counsel for the applicant argues that the grievor was discharged for his alleged failure to follow proper and safe operating procedures when the crane he had been operating upset on March 20th. He asserts that all of the documents sought in the summons are arguably relevant to safe craning procedures, to the incident itself and to the Ontario Hydro policies on which it relies for discharge and barring him from rehire at Darlington. Counsel argues further that the Board should not determine at the start of the case what is the proper scope of the summons because it would be deciding the relevance of the documents in a vacuum. Instead, counsel argues, the Board should assess in the course of the hearing, the relevance of any document not provided in accordance with the summons, if when an issue arises over its relevance and production. As long as the documents sought are arguably relevant to the issues before the Board, counsel contends that they are returnable on summons. Therefore, having regard to the scope of the grievance, the reasons for discharge and the applicant's defence of the grievance (mechanical failure and the grievor operating the crane under the instructions of Ontario Hydro's equipment foreman), he submits that the documents demanded by the summons are arguably relevant to those issues and they should be produced prior to the hearing into the grievance on its merits.

10. Respondent counsel relied on the following authorities in support of his argument that the Board should determine the relevance of those documents, the production of which he opposed: *The Becker Milk Company Limited*, [1974] OLRB Rep. Oct. 732; *Dominion Citrus and Drug Ltd.*, [1982] OLRB Rep. Oct. 1479; *Re Canada Post Corp. and Canadian Union of Postal Workers (Best)* (1986), 24 L.A.C. (3d) 157 (Weatherill); and, *Re Bell Canada and Communications Workers of Canada* (1980), 25 L.A.C. (2d) 200 (P. C. Picher). Applicant counsel referred the Board to *Shaw-Almex Industries Limited*, [1984] OLRB Rep. Apr. 659 and *Mollenhauer Limited*, [1987] OLRB Rep. Sept. 1156.

11. When the Board sits as an arbitrator under section 124 of the Act, it has the same powers as an arbitrator appointed pursuant to section 44. Thus it has the power granted by subsection 44(8)(a)

to summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath in the same manner as a court of record in civil cases.

12. In *Mollenhauer Limited*, *supra*, the Board commented as follows about the exercise of its power to compel the production of documents:

4. ...The production of documents is commonly accomplished through a summons directing a person to attend before the Board and bring with him/her "specified" documents or things. This is often referred to as a subpoena *duces tecum*. The Board's power to compel the production of documents is a significant one and must therefore be exercised circumspectly, particularly where those documents relate to the preparation for or conduct of ongoing negotiations for a collective agreement. Accordingly, a subpoena *duces tecum* is not to be used as a search warrant or to permit a party to search for a case of which it has no knowledge (that is, conduct a fishing expedition) (see *The Becker Milk Company*, [1974] OLRB Rep. 732; *Dinnerex Incorporated*, [1985] OLRB Rep. March 398; *Shaw-Almex Industries Limited*, [1984] OLRB Rep. April 659; *Re Bell Canada and Communications Workers of Canada* (1980), 25 L.A.C. (2d) 200 (P. Picher)).

5. A subpoena which requires the person summoned to bring documents to a hearing with him/her must specify with as much precision as possible the particular documents demanded. The specificity with which documents must be described will depend on what is fair and reasonable in the circumstances. In this regard, it is appropriate to consider whether the documents are identified with sufficient particularity to enable the person summonsed to identify what is

required, whether the party issuing the summons has had an opportunity to examine beforehand or otherwise ought reasonably to be aware of the documents, the witness' familiarity with the documents, the scope of the proceedings, and the purpose for which the documents are sought (see *Dalgleish and Basu*, 51 D.L.R. (3d) 309 (Sask. Q.B.)). In civil proceedings in the District and Supreme Courts of Ontario, the rules of civil procedure provide for extensive discovery of documents both by affidavit and pre-trial examination. That is not the case in proceedings before the Board (except in applications under section 40a and section 91 of the Act where the Board's Rules of Procedure and practice provide for a form of discovery). Consequently, proceedings before the Board are not analogous to civil proceedings in the courts and the Board must be careful not to impose restrictions which, though appropriate in the courts, are not necessarily so in proceedings before the Board. Although there is a difference between the production of documents and the discovery of documents, the distinction between them is somewhat blurred in proceedings before the Board where it is inevitable that some discovery will and must go on through a subpoena *duces tecum*. It is therefore appropriate for the Board to take the broader approach that it has adopted to the production of documents pursuant to a subpoena *duces tecum*. In our view, a party seeking production of documents through a summons need not demonstrate any more than that the documents sought are arguably relevant to the matters in issue (*Dinnerex Incorporated*, *supra*; *Shaw-Almex Industries Limited*, *supra*; *The Becker Milk Company Limited*, *supra*).

The Board herein agrees and adopts the view expressed in *Mollenhauer*, *supra*, that "... a party seeking production of documents through a summons need not demonstrate any more than that the documents sought are arguably relevant to the matters in issue...".

13. The Board will turn first to the documents sought from Ontario Hydro. Counsel for Ontario Hydro has agreed to produce certain of the documents demanded. With respect to the first group, counsel has agreed to produce all of the reports of Ontario Hydro management with respect to the upset of the crane being operated by the grievor Austin on March 20, 1990. This would appear to satisfy all of the documents in the first group. With respect to the second group, counsel advised the Board that there are four sets of records kept with respect to the operation of cranes owned by Ontario Hydro. These include a daily log book, a monthly log book, a repair log book and a file of correspondence pertaining to each unit, referred to as the "unit file". Counsel agreed to produce the three log books for the crane in question, but reserved on producing the unit file until he had satisfied himself as to the relevance of the correspondence in that file. With respect to the third group, counsel agreed that Ontario Hydro would produce the damaged swing lock dog. The parties agreed that it would not be necessary for Ontario Hydro to produce the actual replacement dog and that the production of an identical one would satisfy the summons. Applicant counsel claims that the foreman's handbook referred to in the fourth group of documents contains sections dealing with discipline procedures, crane operating procedures and crane maintenance. Respondent counsel has agreed to produce those sections of the handbook if in fact they do exist and if he agrees that they are relevant. Finally, with respect to the group 5 documents, respondent counsel has agreed to produce any manuals or directives which deal with the imposition and duration of disciplinary penalties including, but not limited, to Ontario Hydro's "no re-hire" policies.

14. Having regard to respondent counsel's undertaking to produce certain documents described above and to the issues involved in the merits of the grievance, the Board directs that Mr. H. Zuzek attend the hearing scheduled for October 2, 1990 and bring with him the following documents and materials:

- (1) all foremen's, general foremen's, supervisors' and managers' reports with respect to the crane being operated by Beverly Austin at the Darlington Generation Station on March 20, 1990;
- (2) all daily and monthly log books and repair log books from January 1, 1987 to date with respect to the crane operated by Beverly Austin at the Darlington Generation Station on March 20, 1990; and, in addition, all correspondence respecting that crane

from January 1, 1987 to date which deals with the operation or maintenance of the unit and any discipline related to its operation or maintenance;

- (3) the damaged swing lock dog which was removed from the crane in question and a duplicate of the part which was used to replace it;
- (4) one Ontario Hydro Foreman's Handbook, Generating Stations Division, together with copies of any sections thereof dealing with the procedures for discipline, crane operation and crane maintenance; and,
- (5) a copy of any Ontario Hydro policy manual or directive dealing with the imposition of disciplinary penalties and their duration, including but not limited to any "no re-hire" policy.

The Board will not require at this time production of the balance of the documents sought by the applicant, particularly those relating to cranes other than the one which the grievor Austin was operating on March 20th. The volume of documents in question is potentially very large and the Board is not satisfied that they are sufficiently relevant to the issues before it in order to warrant their production at this time. In the Board's view, it would be "unreasonable and oppressive" to borrow the Board's turn of phrase in comparable circumstances in *Master Insulation Company Ltd.*, [1979] OLRB Rep. Mar. 236, para. 10, to require Ontario Hydro to produce at the outset the documents sought by the applicant respecting all cranes at Ontario Hydro's installations in the Province of Ontario. Having regard to the fact that Ontario Hydro will have to proceed first with its proof of "just cause" for the discharge, the Board is of the further view that its direction balances suitably the need for some discovery to take place and for limiting the scope of the inquiry to that which is relevant to the issues to be decided. See *Becker Milk Company Limited*, *supra*. That is not to say that the applicant is prevented from pursuing its demands for any of those documents at some later point in the proceedings if, during examination or cross-examination of a witness, it is established to the Board's satisfaction that a document is relevant to and probative of the issues to be decided. In those circumstances, the Board would direct the production of the documents.

15. The Board, at this time, will not direct the production of any of the documents described in the summons *duces tecum* which Ontario Hydro attempted to serve on Joseph Kennedy. The Board is not satisfied at this preliminary stage of the proceedings that they are relevant either to the issues raised by Ontario Hydro's ground for discharge of Beverly Austin or to the applicant's intended defence that, at the time of the crane upset, he had been following proper craning procedures, had acted under the instructions of Ontario Hydro's equipment foreman and that mechanical failure of the equipment was involved. As with the applicant's summons, the Board's ruling is not to be taken as preventing Ontario Hydro from pursuing its demands for any of those documents later in the proceedings, if during the examination or cross-examination of a witness it is established to the Board's satisfaction that the document is relevant to and probative of the issues to be decided. In those circumstances, the Board will direct the production of the document.

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**0246-90-R** Klaus Willroider, Applicant v. The International Brotherhood of Electrical Workers, The International Brotherhood of Electrical Workers Construction Council of Ontario; International Brotherhood of Electrical Workers Locals 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687, and 1739, Respondents v. **Lorne's Electric** - 291360 Ontario Ltd., Intervener

**Bargaining Unit - Construction Industry - Settlement - Termination - Union agreeing on basis of information provided by employer that there was a single employee in the bargaining unit - Union later disputing this information - No allegation of fraud - Allowing union to resile from agreement as reflected in Officer's Report would undermine integrity of Board process and fundamental role of Labour Relations Officers**

**BEFORE:** *Bram Herlich*, Vice-Chair, and Board Members *R. M. Sloan* and *E. G. Theobald*.

**APPEARANCES:** *C. J. Abbass*, *Doug Eastman* and *Klaus Willroider* for the Applicant; *S. B. D. Wahl* and *K. Scott* for all Respondents; *Terry Churchmuch* and *Lorne Bretzlaff* for the Intervener.

**DECISION OF THE BOARD;** September 10, 1990

1. This is an application for a declaration terminating bargaining rights filed pursuant to section 57 of the *Labour Relations Act*.
2. The name of the intervener is amended to read: **Lorne's Electric** - 291360 Ontario Ltd.
3. Having regard to the agreement of the parties the following have been added as named respondents in this application: International Brotherhood of Electrical Workers ("IBEW"); The IBEW Construction Council of Ontario; IBEW Locals 105, 115, 120, 303, 353, 402, 530, 773, 804, 894, 1687, and 1739.
4. The parties met with a Labour Relations Officer on July 10, 1990 in an attempt to resolve or narrow the issues in dispute between them. That meeting resulted in an Officer's Report, signed by the parties and setting out their agreement to the following:
  - (1) The description of the bargaining unit is as follows:

"All journeymen and apprentice electricians and journeymen and apprentice linemen in the employ of **Lorne's Electric** - 291360 Ontario Ltd. in the industrial, commercial and institutional sector of the construction industry in the province".
  - (2) The relevant collective agreement has an expiry date of April 30, 1990 and the present application, having been filed on April 25, 1990, is timely.
  - (3) On the date of application there was one employee employed by the intervener in the bargaining unit.
5. The report also reflects the fact that the respondent indicated it wished to challenge the voluntariness of the petition filed in support of the application. The matter was consequently listed for hearing.
6. In view of the parties' agreement, the Board finds that the bargaining unit is as set out above and that the application is timely.
7. Upon commencement of the hearing and despite the contents of the Officer's Report

adverted to, respondents' counsel advised the Board that there were two issues in dispute. Apart from the issue of the voluntariness of the petition, counsel also advised that he was of the view that there were in fact no employees in the bargaining unit on the date of the application. When the Board expressed its surprise at this issue being raised, Mr. Wahl explained that at the meeting with the Labour Relations Officer the parties had reviewed certain information regarding persons included on the employer's list. While the respondent had agreed that the applicant had been working at an ICI sector job site on the day in question (other employees had been working on residential sites) it now questioned whether the work performed at such site was construction or service and maintenance work. Notwithstanding this assertion, the Officer's Report clearly indicates the parties agreement that there was one employee in the bargaining unit on the date of the application.

8. Both the applicant and intervener objected to the respondent being allowed to raise the issue in view of the parties' previous agreement as reflected in the Officer's Report. The Board invited the respondent to call any evidence available to explain why the issue now being raised had not been raised earlier; no such evidence was provided.

9. While the Officer's Report in this case does not constitute a complete resolution of the matter, it is nonetheless in the nature of a settlement document. It is a document signed by the parties which, on its face, narrows the various issues potentially in dispute to one single issue - the voluntariness of the petition.

10. The value and importance of the settlement process in labour relations cannot be overstated. Settlement documents are not and should not be entered into lightly and as a general rule a party seeking to resile from a settlement document will not be looked upon favourably by an adjudicator.

11. As the Board observed in *Crown Electric*, [1978] OLRB Rep. Apr. 344 at para. 17:

"Parties who enter into written settlements have a responsibility to ensure that they are fully aware of the implications of any document to which they attach their signatures. In the absence of any allegation of fraud the Board must assume that parties have agreed to any settlement plainly expressed in a written document, or otherwise no settlement would be immune from a subsequent challenge".

12. The Board's jurisprudence contains numerous examples of the sentiment expressed in the above quotation being applied to circumstances which may not involve a full settlement of all issues in dispute between the parties (see for example *Harnden & King Construction Ltd.*, [1986] OLRB Rep. May 635 where the respondent, having certified in writing the accuracy of the Officer's Report, was subsequently precluded from resiling from the parties' agreement (as reflected in the report) that a particular individual was not in the bargaining unit; *Ivaco Inc.*, [1987] OLRB Rep. Apr. 511 where the Board declined to entertain an application brought under section 106(2) by a trade union which had several months earlier agreed that the very individuals now the subject of the 106(2) application be excluded from the list of employees for purposes of the count in the certification application; *Lady York Food Market Ltd.*, Board file 1139-88-R, unreported, Jan. 12, 1989 where the respondent had initially raised allegations of intimidation and coercion in regard to the manner in which membership evidence had been obtained but subsequently signed an Officer's Report (and a waiver of hearing form) indicating the applicant was in a "vote position" and was ultimately found by the Board to be precluded from claiming a position - i.e. that the application should be dismissed without a vote on the basis of the allegations - inconsistent with the facts agreed to in the Officer's Report; and *Cedarwood Acres Limited*, Board File 0189-90-R, as yet unreported, July 20, 1990 where the objectors, having agreed, inter alia, to the voters' list and hav-

ing certified that the vote had been fairly conducted, were not subsequently permitted to seek to add persons to the voters' list).

13. Also of interest in the present facts is the case of *We're Econoprint Fast*, [1987] OLRB Rep. Mar. 440. A group of objectors sought an extension of the terminal date so that an untimely statement of desire would be accepted by the Board. The petitioner explained that the petition had not been filed earlier as a result of his reliance upon the employer's assertion that he was not to be included in the bargaining unit. The Board declined to extend the terminal date and cautioned that employees who rely on the advice of their employer with respect to this kind of issue do so at their peril.

14. In the present case the union, admittedly in reliance upon information provided by the employer during the course of the meeting with the Officer, agreed that there was only one employee in the bargaining unit. The union makes no allegation of fraud. If the union asserts that the information relied upon is incomplete or inconclusive, the appropriate time to raise such a concern is before, not after, agreeing to the conclusions which otherwise flow from the information provided. To allow the union to now advance a position inconsistent with its previous agreement as reflected in the Officer's Report would seriously undermine the efficacy and integrity of the Board's processes and the fundamental role of Labour Relations Officers within those processes.

15. In view of these considerations and having regard to the agreement of the parties, the Board finds that there was one employee in the bargaining unit on the date of the present application.

16. We now go on to consider the only remaining issue in dispute between the parties, the voluntariness of the petition. The applicant, Mr. Willroider, who was also the only bargaining unit employee on the date of the application gave evidence as to the origination and circulation of the petition filed in support of his application.

17. As a result of discussions with a fellow (non-ICI bargaining unit) employee the applicant was put in touch with counsel who ultimately represented him in these proceedings. Counsel prepared and delivered a petition form as well as an application to the applicant. On April 17, 1990 the applicant posted a handwritten notice on the bulletin board at the shop indicating there would be a "shop meeting" at 5:00 p.m. at the Lion's Club located about one mile from the workplace. The notice did not indicate the precise purpose of the meeting nor was its invitation limited to employees in the ICI sector.

18. Six employees attended at the meeting. The applicant explained to those attending that in order to decertify the union they had to sign the petition. He explained that he was seeking the signatures of employees who worked "commercially" (i.e. in the ICI sector). Four of the six employees signed the petition - the other two worked exclusively in the residential sector. The other three employees, apart from the applicant, who signed the petition have worked for the employer in the ICI sector but, as already noted, the applicant was the only employee in the bargaining unit on the date of the application. Having secured the requisite signatures, the applicant then forwarded the petition and application to counsel who, in turn, filed these with the Board.

19. The applicant also testified that the April 17th meeting was not the first time decertification had been discussed among employees. Indeed, prior to the April 17th meeting discussion had taken place regarding the need and expense of retaining counsel. Employees agreed to share that cost and one employee had furnished \$500 to the applicant which was used to pay counsel's initial retainer.



20. Mr. Wahl advanced a number of arguments in support of his position that the petition was not voluntary. First, because the applicant had initial conversations with a fellow employee who made the first contact with counsel, Mr. Wahl argued that we did not have evidence with respect to the "origination of the idea" of the petition. There is no doubt in our minds that the applicant was, in fact, responsible for the origination of the petition. We find Mr. Wahl's formulation of the "origination of the *idea*" of the petition somewhat troublesome in that in some strict sense the "idea" of a petition would, in all cases, be traced to the statutory provision contemplating such documents. We are satisfied that, despite his consultation with a fellow employee, the applicant was primarily responsible for the origination of the petition. Further, we find no difficulties in the applicant's evidence which would cause us to question the voluntariness of the petition with respect to its origination.

21. Second, Mr. Wahl argued that we should decline to find the petition voluntary since we have no direct evidence as to its actual preparation or delivery to the Board. In this respect the uncontradicted evidence is that the applicant received the petition from counsel and returned it to him once the signatures had been obtained. The application and accompanying petition were filed with the Board along with a covering letter from counsel on April 25, 1990. There is no suggestion that counsel was acting on behalf of anyone other than the applicant. In the absence of any challenge to the propriety of Mr. Abbass' conduct or of any suggestion that there was anything untoward involved in his preparation of the petition, his delivery of the petition to the Board, or his custody of the petition, we are unable to accept that the failure of the applicant to call Mr. Abbass to testify has any impact on the issue of the voluntariness of the petition (in this regard see *Labatt's Ontario Breweries*, [1985] OLRB Rep. Mar. 433).

22. Finally, Mr. Wahl pointed to certain portions of the evidence in arguing that we should conclude actual or perceived management involvement in the petition. Employees attending the April 17th meeting were told that \$500 had been raised to pay the initial retainer but were not told the source of those monies. The evidence before us, however, was that the money came from a fellow employee and, whether or not that specific piece of information was communicated to those attending the meeting, we see no basis in the evidence to conclude that there was, or that any reasonable employee would believe there was, any management involvement in this regard. Mr. Wahl argued that since the notice of the meeting was posted on the company bulletin board, employees might think attendance was being directed by the employer. The evidence, however, was that no management personnel attended the meeting and that the bulletin board in question is not used exclusively for notices posted by management. Finally, Mr. Wahl referred to the mandatory directions the applicant gave to fellow employees attending the April 17th meeting. While the applicant advised fellow employees that "they had to sign the petition in order to get decertified", we find nothing intimidatory, coercive or otherwise improper in his manner of presentation.

23. For all the above reasons and on the basis of the evidence and representations before it, the Board is satisfied that not less than 45% of the employees of Lorne's Electric - 291360 Ontario Ltd. in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade unions on June 1, 1990, the terminal date fixed for this application and the date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union under section 57(3) of the said Act.

24. The Board directs that a representation vote be taken of the employees of the inter-

vener employed in paragraph 4 above. All those employed in that bargaining unit on September 10, 1990 who are so employed on the date the vote is taken will be eligible to vote.

25. Voters will be asked to indicate whether or not they wish to be represented by the respondents in their employment relations with the intervener.

26. The matter is referred to the Registrar.

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**0787-90-U Northfield Metal Products Ltd., Applicant v. Glass, Molders, Pottery, Plastics and Allied Workers International Union (A.F.L. - C.I.O. - C.L.C.), Respondent**

**Remedies - Strike - Employer seeking relief against illegal strike long after cessation of activity complained of - Board not prepared to grant relief under circumstances**

**BEFORE:** *Robert D. Howe*, Vice-Chair.

**APPEARANCES:** *Irwin A. Duncan* for the applicant; *Joanne L. McMahon*, *Brian Scott*, and *Ross Armstrong* for the respondent.

**DECISION OF THE BOARD;** September 13, 1990

1. This is an application for declaratory relief under section 92 of the *Labour Relations Act*.

2. On September 11, 1990, after hearing and recessing to consider the submissions of the parties regarding certain preliminary matters raised by the respondent, the Board rendered the following oral ruling:

Section 92 of the *Labour Relations Act*, which is the provision which empowers the Board to grant declaratory relief of the type requested by the applicant, also makes the granting of such relief discretionary. It is well established in the Board's jurisprudence that the purpose of the remedies available under section 92 is not to punish, but rather to provide information and guidance to the parties as to their legal rights, and to bring to an end unlawful conduct which falls within the purview of that provision. It is also well established that the Board will generally not grant a declaration or any other relief under section 92 if the strike activity has ended by the time of the hearing, unless there has been a pattern of unlawful strikes, the employer has reason to fear a recurrence of the strike activity, the strike has implications extending beyond the parties, or the purpose of the strike is to compel the employer to bargain with a union that is not the employees' bargaining agent (see *Sack and Mitchell, Ontario Labour Relations Board Law and Practice*, at paragraph 8:8130). None of those exceptional circumstances is applicable in the instant case. On the basis of the allegations contained in the application, all of which are assumed for purposes of this ruling to be true and provable, it is clear that the alleged work slowdown at the "1800 table"

commenced in April of 1989 and ended on September 18, 1989. However, this application was not filed until June 18, 1990, nine months after the alleged unlawful activity had ceased, and almost three months after the union's bargaining rights were terminated as a result of a representation vote conducted by the Board on March 27, 1990. Although the respondent may not have been in a position to fully quantify the slowdown until the Fall of 1989, it is clear from the facts pleaded in the application that the company was aware of the slowdown in the Spring of 1989 and raised the matter during negotiations as early as May 11, 1989. As indicated in Practice Note No. 16, a section 92 applicant can generally obtain an expedited hearing of its application. Given that relief under section 92 is intended to provide information and guidance to the parties, and to bring unlawful conduct to an end, it would not be in the interests of sound labour relations to grant relief under section 92 where a party delays bringing such application until long after the allegedly unlawful conduct has ceased, and the union's bargaining rights have been terminated, with a view to obtaining damages against the union. For the foregoing reasons, assuming all of the facts alleged in the application to be true and provable, the Board, in the exercise of its discretion under section 92 of the Act, would not be prepared to grant declaratory or any other relief in the circumstances of this case. Accordingly, the application is hereby dismissed.

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**1473-88-M Canadian Union of Public Employees and its Local 1680, Applicant v. Peterborough County Board of Education, Respondent**

**Employee Reference - Mere fact that an individual exercises professional responsibilities which may include some professional supervision of other professionals, does not mean that individual cannot be an employee for purposes of Act - Behaviour Counsellors employed by school board not excluded**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

**DECISION OF THE BOARD;** September 7, 1990

1. The applicant trade union seeks to have the Board determine, under section 106(2) of the *Labour Relations Act*, whether Nancy Brown (who is classified as a "Print Shop Supervisor"), and Susan McCaig, Patricia Warden, John Lapum, Nancy Chesher-Manbeck and Robert Ballarin (all of whom are classified as "Behaviour Counsellors") are "employees" within the meaning of the *Labour Relations Act*.

2. In accordance with its usual practice in such applications, the Board authorized a Labour Relations Officer to inquire into and report to the Board with respect to the individuals whose "employee" status is an issue. Pursuant thereto, a Labour Relations Officer convened a meeting of the parties. That was adjourned when one of the individuals in question requested an adjournment to seek legal advice and, possibly, status to participate in the proceeding as a party.



3. By decision dated March 6, 1990 (reported at [1990] OLRB Rep. March 330), the Board ruled that the persons whose employee status is an issue herein were entitled to participate as parties. Subsequently, the Labour Relations Officer convened another meeting of the parties. Ms. McCaig, Mr. Lapum and Ms. Chesher-Manbeck attended and are shown in the Officer's Report to the Board as having participated as representatives of the intervener (which we take to be a reference to them and Pat Warden, having regard to the letter dated February 26, 1990 to the Board signed by those four individuals in that respect). Ms. Brown testified before the Officer. Ms. Warden also testified before the Officer and the parties agreed that her evidence would be representative of the duties and responsibilities of all the persons classified as Behaviour Counsellors whose employee status is an issue. All parties were given an opportunity to examine Ms. Brown and Ms. Warden and to present other evidence.

4. Subsequently, the testimony of Ms. Brown and Ms. Warden, who were the only persons to testify before the Officer, was transcribed in the Officer's Report to the Board. A copy of the Officer's Report was circulated to the parties for their comment. Neither the applicant nor any of the individuals in issue made any comment or representations in that respect. The respondent made representations by letter dated August 16, 1990. No one requested that the Board hold a hearing with respect to the matter and we find it appropriate to dispose of this application on the basis of the material before the Board without a hearing.

5. We note the agreement of the parties that the disposition of this application should be based on the duties and responsibilities of the individuals in question as of January 3, 1990.

6. The respondent submits that the parties have agreed, since at least 1987, that Ms. Brown's position is one properly excluded from the bargaining unit and that nothing has occurred since which would justify including it in the bargaining unit. It also submits that the individuals classified as Behaviour Counsellors should be excluded from the bargaining unit. That, of course, is not the issue before the Board. As the respondent itself notes at page 4 of its August 16, 1990 letter, the mere fact that the Board finds an individual to be an employee within the meaning of the *Labour Relations Act* does not necessarily mean that that person is an employee in the bargaining unit covered by the collective agreement between the parties. That latter question is one for a Board of Arbitration to determine (see *Re Miller et al and Algoma Steelworkers Credit Union Ltd. et. al.* (1974) 6 O.R. (2d) 676 (Ont. Div. Ct.); *Nelson Crushed Stone*, [1980] OLRB Rep. Oct. 1500; *Northern Telecom*, [1983] OLRB Rep. Jan. 95; *The Windsor Star*, [1988] OLRB Rep. Apr. 427). Consequently, while there may be an overlap between them, and while an answer to one may well answer the other for practical purposes, the two questions are not necessarily congruent. In this application, the Board will determine only whether the individuals named in paragraph 1 above are "employees" within the meaning and for the purposes of the *Labour Relations Act*, not whether they are employees in the bargaining unit covered by the collective agreement between the parties.

7. Nancy Brown has been the respondent's Supervisor of the Print Shop since December, 1987 (this application was made in September 1988). As such, she oversees the incoming and outgoing mail. It is unclear exactly what it is she oversees since the mail is not opened in her department, but she presumably ensures that ingoing mail is distributed properly and that outgoing mail in fact goes out. Ms. Brown is also responsible for fulfilling the printing requirements of the respondent's office, the "Resource Centre", some schools, and some outside organizations which are apparently serviced by the respondent.

8. In the course of performing these functions, Ms. Brown prices and schedules printing jobs, and answers questions with respect to how they are to be performed. Ms. Brown testified

that one full-time operator, one part-time operator (who really seems to be a casual full-time employee who works in the department on an "as needed" basis), and a "summer" operator work under her direction and control. She performs a job training function with these people, assigns work to them, and reports verbally to her supervisor with respect to their work performance. She is not familiar with the respondent's discipline procedure (if there is one) and doesn't have the authority to suspend or discharge anyone. She did sit in on a hiring interview of an applicant for a position outside of her department. However, having regard to the fact that she did not participate in the hiring of the present full-time operator, and her description of her participation in the process she was involved in, it is apparent that she was involved to provide a female presence and that she had no real input into it. Regular hours of work are set by policy directive of the respondent. Vacations are scheduled, it seems, by "mutual accommodation" of those in the department. She has validated overtime; that is, confirmed that overtime claimed has in fact been worked. She has also scheduled overtime on her own authority and has granted "casual" time off for things like medical appointments. Finally, Ms. Brown appears to have some limited authority to requisition necessary materials for the print shop.

9. In determining whether a person is an "employee" within the meaning and for purposes of the Act, the Board examines the duties and responsibilities of the persons in question as a whole within the context of the employer's business and structure. The Board assesses the extent to which the persons whose status is in issue exercises duties and responsibilities which affect the job security or economic position of other persons such that they are incompatible with them for collective bargaining purposes (see, for example, *Caledon Hydro-Electric Commission*, [1979] OLRB Rep. Oct. 924; *Corporation of the Township of West Lincoln*, [1981] OLRB Rep. April 436; *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121; *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84).

10. Other than her ability to schedule overtime, there is nothing in what Ms. Brown does which suggests that she exercises real managerial functions. Since there is no evidence of what use, if any, is made of her reports concerning work performance, it cannot be said that Ms. Brown has any power of effective recommendation in that respect. And, except for her ability to authorize overtime, there is nothing which she does which could be said to have an impact on other employees such that she is incompatible with them for collective bargaining purposes. Even in authorizing overtime, her authority is rather limited given that the need for it is determined by the work to be done and given that she has very little flexibility in assigning it (by virtue of the number of people who work in the department). On balance, we are not satisfied that her overtime authority alone would cause us to find Ms. Brown to not be an employee.

11. However, Ms. Brown also has ready access to and must, in the course of her work, review documents which contain material used by the respondent in various of its meetings. This material includes the respondent's collective bargaining strategy and material relating to the discipline of other employees.

12. The purpose of what is commonly referred to as the second branch of section 1(3)(b) of the Act is to exclude from operation of the Act persons whose work brings them into contact with confidential material relating to labour relations. This enables an employer to better ensure that knowledge of its internal labour relations strategies and communications is restricted to persons whose loyalty is more likely to be undivided (*Town of Gananoque*, [1981] OLRB Rep. July 1010; *York University*, [1975] OLRB Rep. Dec. 945). A person's involvement with such information must be more than occasional or peripheral to justify a finding that s/he is not an employee for purposes of the Act (*Frito-Lay Canada Ltd.*, [1978] OLRB Rep. Sept. 831). There is also a distinction to be drawn between labour relations information, access to which would bring the person within

the section 1(3)(b) exclusion, and personnel information, access to which would not necessarily do so.

13. On the evidence before the Board, we are satisfied that Ms. Brown has regular access to confidential information which is material to the respondent's labour relations. We therefore find that Ms. Brown is employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Act and that she is therefore not an "employee" within the meaning and for the purposes of the Act.

14. The other five persons in issue in this application are classified as Behaviour Counsellors. There is some suggestion in the Officer's Report to the Board that some of the duties and responsibilities of these persons have changed since January 3, 1990, as of which date the parties agreed their "employee" status should be assessed. However, there is no suggestion that the Board should consider anything that may have occurred subsequent to that date. Indeed, in the respondent's submission, this application should "...be specifically restricted to the status of those individuals as at or prior to January 3, 1990." Having regard to the agreement of the parties, the Board finds it appropriate to dispose of this application, insofar as it relates to the five persons who are classified as Behaviour Counsellors, on the basis of the agreed January 3, 1990 date.

15. When dealing with a professional context, it can be difficult to distinguish professional from managerial functions as the latter term is commonly applied in a typical office or industrial setting. Nevertheless, there is a distinction between the two. The evidence in this case suggests that Ms. McCaig, Ms. Warden, Mr. Lapum, Ms. Chesher-Manbeck, and Mr. Ballarin are highly qualified individuals with important responsibilities, and that they play a significant role in the respondent's business of providing educational services. However, the mere fact that an individual exercises professional responsibilities, which may include some professional supervision of other professionals, does not mean that that individual cannot be an employee for purposes of the *Labour Relations Act* (see *Spar Aerospace Products Ltd.* [1979] OLRB Rep. July 700; *Ottawa General Hospital*, [1984] OLRB Rep. Sept. 1199; *Kitchener-Waterloo Hospital*, [1986] OLRB Rep. May 651).

16. On the evidence before the Board, none of the five persons who are classified as Behaviour Counsellors exercise or have any power to hire, fire or discipline other employees. They have no power to affect, either directly or indirectly, the wages, benefits or hours of work of other employees. While they do have access to confidential medical records, they have no access to any information which is confidential in the labour relations sense. In short, there is nothing before the Board to indicate that these five persons, or any of them, exercise any managerial functions, or that they, or any of them, are employed in the confidential capacity in matters relating to labour relations. We therefore find that Ms. McCaig, Ms. Warden, Mr. Lapum, Ms. Chesher-Manbeck, and Mr. Ballarin are employees within the meaning and for the purposes of the *Labour Relations Act*.

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**1635-89-R** United Brotherhood of Carpenters and Joiners of America, Local Union 27, Applicant v. **Racal-Chubb Canada Inc.**, Respondent v. Group of Employees, Objectors

**Certification - Petition - Individual originating and circulating petition was conduit to, and identified with, management - Board not satisfied of voluntariness of petition**

**BEFORE:** M. A. Nairn, Vice-Chair, and Board Members J. A. Rundle and C. McDonald.

**APPEARANCES:** J. D. Watson and Allan Wall for the applicant/complainant; Robert Routliffe and Terry S. Ryce for the respondent; Michael Horan and C. Jennings for the objectors.

**DECISION OF THE BOARD;** September 7, 1990

1. Further to the panel's decision dated May 2, 1990 the parties reconvened before us to deal with the issue of whether the statement of desire (the "petition") filed in connection with the certification application in File No. 1635-89-R represented a voluntary statement of employee wishes. Having heard the evidence and submissions of the parties, we ruled that we were not satisfied that the document was a voluntary statement of employee wishes and therefore would not cast doubt on the membership evidence filed by the applicant. In a decision dated June 29, 1990 we issued a certificate to the applicant. We have been asked to provide our reasons with respect to the ruling on the statement of desire.

2. The approach the Board takes to its inquiry into the voluntariness of any statement of desire filed in opposition to an application for certification was described in *Chatham Concrete Forming*, [1986] OLRB Rep. Apr. 426 (and the cases cited therein) as follows:

13. The system of certification prescribed in Ontario by the *Labour Relations Act* rests primarily upon an assessment of the union's membership support based upon an examination of its documentary evidence of membership. Upon showing the requisite membership support, the union is "certified" or granted a licence to bargain on behalf of a group of employees - subject, of course, to their right to file a timely application terminating bargaining rights. The Board does not solicit *viva voce* opinions about the virtues of trade union representation (see Rule 73(2)), nor, in this jurisdiction, is a representation vote the primary vehicle for achieving the right to represent employees. That right depends upon the solicitation of a sufficient number of membership cards authorizing the union to act as bargaining agent, and to protect employees from possible employer reprisals the anonymity of the union supporters is preserved. That is the way it has been for more than thirty years, ... Representation votes are a residual mechanism resorted to where the union cannot demonstrate a "clear majority" (i.e., more than fifty-five per cent) or where, in the Board's discretion, a representation vote should be held in the particular circumstances of a case. One of those circumstances is a purported change of heart by employees who have previously signed union membership cards.

...

16. The Board must be satisfied, however, that when these union supporters sign the petition indicating an apparent change of heart, they are doing so voluntarily, and are not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer, or could result in reprisals. It must be clear that the circulation of the petition is free from the actual or perceived influence of management. Often, as in the present case, a petition will be signed by employees who have indicated their support for the union only a short time before, and a natural question arises as to what prompted the change of heart. Was it prompted by a reappraisal of the value of collective bargaining, or by a reluctance to identify oneself as a union supporter when presented with the petition document? While an employee can be reasonably assured that his support for the union will not be communicated to his

employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. And lest it be thought that the identification of union supporters and opponents is neutral information, one must remember that the Legislature does not regard it that way. Section 111 of the Act is designed to preserve the secrecy of the employees' choice. The Legislature has recognized the employees' concerns and sensitivities. ...

17. Frequently, as in the present case, anti-union petitions are openly circulated on or near the employer's premises, or during working hours, by employees who, in their opposition to the union, will be objectively aligned in interest with their employer and may be perceived to be acting on its behalf. In these circumstances, an employee may sign a petition because he fears that a refusal to do so will expose his support for the union and will be made known to his employer. Similarly, an employee may be motivated to sign because of conduct which suggests that continued support for the union will result in the loss of his job or other adverse employment consequences. In neither case can one regard his signing the petition as being truly voluntary - although, of course, the mere identity of interest between the employer and the objecting employees is obviously not sufficient in itself to link the petition with management in the minds of reasonable employees, or undermine the reliability of the signatures placed on it. There must be more than that, and each case must be considered on its own merits. On the other hand, in the Board's experience there are enough instances where employers have committed unfair labour practices, or have sponsored or supported anti-union petitions that these employee fears cannot be discounted as being patently unreasonable. Again, that is why the Act preserves the secrecy of union membership.

18. It is for this reason that the Board undertakes the inquiry contemplated by Rule 73(5) of the Rules of Practice, in order to satisfy itself from the circumstances of the origination, preparation, and circulation of the petition, that the document truly represents the voluntary wishes of those who signed it. ...

3. Also, in *Picker International Canada Inc.*, unreported decision, Dec. 19, 1988 (and the cases cited therein), the Board explained:

12. When assessing whether a petition represents a voluntary expression of the wishes of those employees who signed it, the Board has regard to the overall environment in the workplace and recognizes the responsive nature of the employer-employee relationship. The Board will not give any weight to a petition where management has been involved in the origination or circulation of the documents. If the objecting employees are not the beneficiaries of employer support, the Board will still give the petition no weight where the evidence demonstrates that the manner in which the document was prepared or circulated would lead typical employees to conclude that management was involved with the petition or might become aware of who signed or did not [sic] the document. From the Board's perspective, the impact on employee wishes is the same when management is directly involved or when employees simply perceive that management is involved. The onus is on the objecting employees to prove on the balance of probabilities that the petition represents a voluntary expression of the employees' wishes.

4. As was agreed at the outset of the hearings, the panel took into account in its determination the evidence that it received with respect to the issue of whether Mr. Moore and Ms. Jennings, employed as dispatchers, exercise managerial functions. The panel determined that these two individuals did not in fact exercise managerial functions so as to exclude them from the bargaining unit pursuant to section 1(3)(b) of the *Labour Relations Act*.

5. Ms. Jennings was responsible for the origination and preparation of the petition. She was also involved in its circulation. We do not intend to review all of the evidence we heard with respect to the duties and responsibilities of both Ms. Jennings and Mr. Moore and the evidence regarding the actual origination, preparation and circulation of the document. The panel's finding that we would not place any weight on the document filed as we were not satisfied that it represented a voluntary expression of employee wishes, is based on our view that a reasonable employee would at the very least, perceive management's involvement in this petition raising concerns that management might become aware of who signed or did not sign it.

6. A number of circumstances, taken together, lead to this conclusion. Although the evidence did not establish that Ms. Jennings exercised actual managerial authority, it is clear, and was conceded by all, that she acts as a conduit to management. In addition, some of her duties would in our view, lead a reasonable employee to conclude that her duties were more closely aligned with management. For example, Ms. Jennings maintains a log book wherein she records recalls that are made to customers in circumstances where the work was either not completed or there was a complaint. The employees were advised that she would be keeping such a record in the summer of 1989. This notice was placed by Ms. Jennings on the bulletin board in her office. Mr. Federico, a managerial employee, reviews these entries and initials them. Mr. Ryce, the Branch Manager, also has access to this book. As a result of these notations further investigation may be initiated and the potential for consequences to employees (both disciplinary & congratulatory) exists.
7. Certain notations in the log are of particular concern with respect to the issue of the voluntariness of the petition. A page of notes marked as Exhibit 11 and dated October 6, 1989 (the day the Notice to Employees was posted) discloses the identity of certain employees who signed the petition. In describing a conversation in the plant among employees and Mr. Ryce, Ms. Jennings informed them that she'd quit if a union were certified. The notes indicate this but the words "and would find a way" are scratched out. On their face these notations are not determinative, but the explanations provided by Ms. Jennings in her evidence were vague and unresponsive. Although she testified that she did not speak to management regarding the petition, the fact that she kept these notes in a document readily accessible to management supports the applicant's contention that the employees would reasonably believe that Ms. Jennings was aligned with management and would reasonably perceive the involvement of management in the petition.
8. Although we were not satisfied that Ms. Jennings had involvement in actual management decision-making and made no effective recommendations with respect to employees' work or performance, we are satisfied that she discussed these matters with Mr. Federico and that Mr. Federico sought her input in decisions. It is also fair to say that the employees understood Ms. Jennings to have had such input. Ms. Jennings often made reference to the term "we", both to employees and before the panel, when discussing changes in the workplace involving decisions of Mr. Federico. We refer to the incidents involving Mr. Roth's return to the road, Mr. Martin's receiving his van, and bringing Mr. Roberge back into the shop.
9. Ms. Jennings also had a closer relationship with Mr. Federico than other employees. Prior to his employment with the respondent, she had been employed by him. It was through Mr. Federico that Ms. Jennings became aware of the opening for a dispatcher with the respondent in early June 1989. Throughout the period of time that the petition was being circulated Mr. Federico and Ms. Jennings travelled to work together while her vehicle was temporarily out of service. This was known to the employees.
10. It was conceded by the respondent that Mr. Moore and Ms. Jennings performed essentially the same job. Mr. Moore, an employee of some 44 years had been a member of management and we were satisfied that he continued to hold himself out to employees as such. By virtue of the recent company reorganization in the spring of 1989 those responsibilities which fall within the exercise of managerial function pursuant to section 1(3)(b) were in fact removed from Mr. Moore. This may not have been clear to the employees however and again is consistent with the view that Ms. Jennings was perceived to be acting on management's behalf.
11. By virtue of an informal meeting of employees late in the day on October 6, 1989, a number of them were aware that a petition was being prepared by Ms. Jennings. It was acknowledged by both Ms. Jennings and Mr. Bishop, the other individual involved in circulating the peti-



tion, that it was common knowledge in the plant that the petition was being kept in Ms. Jennings's purse in her office. At least two employees approached her there to sign it. Mr. Federico is regularly in Ms. Jennings's office and has access to it, for example, to review the log book, in her absence.

12. There were inconsistencies in the evidence between Mr. Bishop and Ms. Jennings and discrepancies between the evidence and the document, which, taken as part of the whole, caused us concern. One relates to the origination of the document and the timing of phone conversations with Ms. Jennings's father, whom she testified proposed the idea of the petition and helped her with the wording. A second is with respect to the circulation and custody of the document whereby Mr. Bishop testified he took it home with him one evening yet this was not apparent from Ms. Jennings's evidence. A third is with respect to the location where certain signatures were obtained.

13. Overall, we were not satisfied that the document represented a voluntary expression of employee wishes, but rather that individuals signing it may well have done so in the belief that the fact of their signing or not signing the document might well come to the attention of management. Consequently it did not place doubt on the membership evidence filed by the applicant. A certificate therefore issued to the applicant.

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### **1011-88-G Sheet Metal Workers International Association, Local 47, Applicant v. Robert Laframboise Mechanical Limited, Respondent**

**Collective Agreement - Construction Industry - Construction Industry Grievance - Evidence - Union claiming right to preparation of interference drawings contracted out by employer - Union claim based on agreement rights to "preparation of all shop and field sketches used in fabrication and erection" and to "all other work included in the jurisdictional claims" of union - Board admitting extrinsic evidence - Interference drawing not a "sketch" - Right to "all other work" claimed by union covers no more than work similar in nature to work specifically claimed in agreement - Application dismissed**

**BEFORE:** *N. B. Satterfield*, Vice-Chair, and Board Members *D. A. MacDonald* and *S. Weslak*.

**APPEARANCES:** *Bernard Fishbein*, *Ross Mitchell* and *Robert Belleville* for the applicant; *Peter Chauvin* and *Robert C. Laframboise* for the respondent.

### **DECISION OF THE BOARD; September 27, 1990**

1. The Board dismissed this application made under section 124 of the *Labour Relations Act* for final and binding arbitration of a grievance in the construction industry for reasons which were to be given later. These are the Board's reasons for its decision.

2. The grievance alleges that the respondent failed to employ members of the applicant Sheet Metal Workers International Association, Local 47 ("Local 47") to perform work covered by the collective agreement binding on them on the respondent's construction projects, including the Hotel Dieu Hospital in Cornwall, Ontario, and, in doing so, has violated various provisions of the collective agreement. More specifically, Local 47 alleges that the respondent has employed persons who are not members of Local 47 to prepare "...shop and field sketches used in fabrication

and erection..." contrary to the 1986-88 and 1988-90 provincial collective agreements between the Ontario Sheet Metal and Air Handling Group and the Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference. The Ontario Sheet Metal and Air Handling Group is the designated employer bargaining agency for purposes of bargaining a provincial agreement (which the Agreements are). As such, it represents in bargaining all employers who are bound by these agreements, the local trade associations who are bound by them and employers who are members of those associations. The Sheet Metal Workers' International Association ("the Association") and Ontario Sheet Metal Workers' Conference together are the designated employee bargaining agency for purposes of bargaining a provincial agreement on behalf of each other and their affiliated bargaining agents covered by the agreement. Local 47 and 10 other locals of the Association are the affiliated bargaining agents bound to the 1986-88 and 1988-90 provincial agreements. The Board will refer to them individually as "the 1986-88 Agreement" and "the 1988-90 Agreement" and collectively as "the Agreements".

3. The parties agreed that Local 47 and the respondent are bound to the Agreements. They agreed also that the Board should decide only the issue of the respondent's alleged breach of the Agreements and, if found, remain seized in respect of the amount of damages owing, if any.

4. Counsel for the parties agreed at the start of hearing into the application that the specific work alleged to have been performed by persons who are not members of Local 47 contrary to the Agreements is the preparation of interference drawings. While the primary position of each was that the relevant language of the Agreements was unambiguous, they acknowledged that the Board likely would need to hear extrinsic evidence of past practice under the Agreements and of the negotiating history of the parties in order to satisfy itself whether there is a latent ambiguity in the relevant Agreement language. Consequently, they asked the Board to admit such extrinsic evidence subject to final argument on relevance and weight, if any, to be given to that evidence. The Board proceeded according to their agreement.

5. The Board heard the evidence of 21 witnesses during 15 days of hearings extending over a seven month period. The findings of fact herein have been made having regard to the Board's assessment of the witnesses' credibility and to the submissions of counsel on the evidence and the credibility of witnesses. The Board's assessment of credibility took into account the clarity with which witnesses were able to recall and relate the events about which they were testifying, having regard to the fact that many of them were testifying to events which happened as long as 20 years ago, their ability to avoid the influence of self-interest, their general demeanour, the submissions of counsel and what is reasonably probable in the circumstances about which they were testifying. Some witnesses for both parties occasionally succumbed to the influence of self-interest in the process of trying to recall and recount details of events which had occurred 10 to 20 years ago. In assessing their evidence in particular, the Board has had regard for what is reasonably probable in the circumstances. The Board will deal with particular issues of credibility to the extent necessary in setting out its findings of fact.

6. The wording of the specific clauses of the Agreements on which Local 47 relies for its claim that preparation of interference drawings is work covered by the Agreements did not change between the 1986-88 Agreement and the 1988-90 Agreement, but one clause was re-located from the Ottawa Appendix of the 1986-88 Agreement to the Body of Agreement in the 1988-90 Agreement. The parties agree that the meaning of the clause did not change as a result of its re-location. The Agreements are organized into a main part called the "Body of Agreement", a series of appendices and a Wage Schedule. The language at issue about whether the preparation of interference drawings is work covered by the Agreements is located in the Body of Agreement section and in Appendix "E" - Ottawa Area. It is the emphasized passages of the quotations set out below.

Clause 1.1 of the Agreements provides that the appendices and Wage Schedule form part of each Agreement. Clause 1.2 of the Agreements states:

1.2 To the extent that an appendix covers matters dealt with in the body of this Agreement the terms of that Appendix shall govern for its relative geographic area or segment of the sheet metal industry. To the extent that an Appendix is silent on such matters the terms and conditions set out in the body of this Agreement shall govern.

Clause 19.1 - Trade Jurisdiction of the Ottawa Appendix of the 1986-88 Agreement provides in part that:

19.1 The terms of the Body of this Agreement and of this Appendix "E" are hereby recognized and accepted as binding on the Local Trade Association and Local Union No. 47 and shall apply in the manner and under the conditions specified therein to the:

...

(e) *...preparation of all shop and field sketches used in fabrication and erection;*

(f) *all other work included in the jurisdictional claims of Sheet Metal Workers' International Association, and none but journeymen sheet metal workers and registered apprentices, recognized by Local Union 47 shall be employed on said work by the employers,... The above specified work must be executed within the geographic area of this Appendix, regardless of prevailing wage rates that exist in other areas.*

[emphasis added]

The "Local Trade Association" is the Mechanical Contractors Association - Ottawa (hereafter "the MCA-Ottawa"). Clauses (a) to (d) describe a variety of work claimed to be the work jurisdiction of Local 47 (see clause 19.1 quoted in full at paragraph 16). The relevant part of Clause 19 - Trade Jurisdiction of the Ottawa Appendix of the 1988-90 Agreement states:

#### Clause 19 - TRADE JURISDICTION

Refer to Article 29 Body of Agreement

19.1 The terms of this Agreement including this Appendix "E" are hereby recognized and accepted as binding on the Local Trade Association and Local Union No. 47 and shall apply in the manner and under the conditions specified herein including:

- *the preparation of all shop and field sketches used in fabrication and erection;*

...

The above specified work must be executed within the geographic area of this Appendix, regardless of prevailing wage rates that exist in other areas.

[emphasis added]

Article 29 - Trade Jurisdiction in the body of the 1988-90 Agreement provides that:

#### Article 29 - TRADE JURISDICTION

This Article does not apply to Appendix "A", Sheeting and Decking.

Refer to Clause 19, Local Appendices for additional provisions.

This Agreement covers the rates of pay, rules and working conditions of all employees of the employer engaged in but not limited to:



- (a) the manufacture, lay out, fabrication, assembling, handling, erection, installation, dismantling, conditioning adjustment, alteration, repair and servicing of all ferrous or non-ferrous metal work and all other materials used in lieu therefore;
- (b) all pollution control systems, dust collecting and control systems, vacuum systems, grain spouting, material blowing, any and all types of product moving systems air or otherwise and including recovery systems;
- (c) all heating, ventilating and air-conditioning systems and all other forms of air handling systems regardless of material used, all humidifiers, de-humidifiers (dryers), all associated ducting for a complete air handling system regardless of gauge, all hoods, cabinets, including the setting of all equipment and all reinforcements and hangers in connections therewith;
- (d) all lagging over insulation and all duct lining regardless of gauge or material used, all internal insulation thermal, acoustical regardless of material used, sound attenuators and silencers;
- (e) testing and balancing of all air handling equipment and duct work;
- (f) all metal working aspects of the showcase, display neon and metal sign industry;
- (g) all metal cabinets, custom built tables, counters, fixtures, etc. normally associated with hospital and kitchen equipment work and environmental control rooms, clean rooms, including walk-in coolers erected on site;
- (h) all sheet metal cladding, sheeting, enamel panels, fascia, soffits and decking regardless of the type of structural frame involved;
- (i) the placing and installation of standard metal, production items such as metal shelving, metal lockers, window frames, toilet partitions and all metal ceiling systems etc.;
- (j) any and all sheet metal work in connection with laundry shutes and garbage chutes which are a permanent part of the building;
- (k) the erection of ventilators, ovens and spray booths;
- (l) all rigging, lifting and placing of all sheet metal trade materials and equipment on the jobsite (subject to trade practice);
- (m) all metal roofing including but not limited to sheet metal gutters, flashings, copings, vents, etc. or materials used in lieu thereof and all grouting associated with the roofing industry;
- (n) the fabrication and installation of computer floors;
- (o) the installation of radiator covers, convector covers and all continuous grilles and all support brackets, carrier brackets used in association therein;
- (p) installation of all draft curtains, fire stops;
- (q) fabrication and installation of catch pans and guards, covers for conveyor systems regardless of type, edge dryers, lubrication bot coolers associated with pulp, paper, gypsum and cement plants;
- (r) all tools powered or otherwise, used on all projects and shops for work under the jurisdiction of a local union covered by this Agreement shall be operated only by bona fide members of the Sheet Metal Workers' Union;

*and all other work included in the jurisdictional claims of the Sheet Metal Workers' International Association;*

Only certified journeymen and registered apprentices and other qualified sheet metal workers recognized by the local union shall be employed on any of the said work by the Employer;

...

[emphasis added]

The Body of Agreement of the 1986-88 Agreement does not contain an article for trade jurisdiction.

7. Local 47 claims that the preparation of interference drawings is included in the phrase "...the preparation of all shop and field sketches used in fabrication and erection,..." which appears in Clause 19.1 of the Ottawa Appendix in the Agreements. In any event, if it is not included in that language, Local 47 claims that work is captured by the basket clause "...and all other work included in the jurisdictional claims of Sheet Metal Workers' International Association,..." which is part of sub-clause (f) of Clause 19.1 of the Ottawa Appendix of the 1986-88 Agreement and part of Article 29 -Trade Jurisdiction of the Body of Agreement in the 1988-90 Agreement.

8. There was no dispute between Local 47 and the respondent about what was an interference drawing. Exhibit 3 in these proceedings is one of the respondent's drawings from the Hotel Dieu Hospital project. The parties agree that it is an interference drawing. They agree also that, for a sheet metal contractor, the purpose of preparing interference drawings is to identify, display and resolve conflicts between duct work and air handling equipment for the heating, ventilation and air conditioning system of a building project and the structural and architectural elements of the building or other building services like plumbing and electrical. Not all building projects require the use of interference drawings to reveal and resolve interferences. Sometimes the engineering drawings which are part of the contract documents will show the interferences. When they do not, if drawings identifying interferences are needed, the contractor prepares them or has them prepared. It is when the contractor prepares them or has them prepared that Local 47 claims the preparation must be done by sheet metal workers employed under the terms and conditions of the Agreements. The respondent obviously disagrees with that claim. The respondent prepares interference drawings for 10 to 15 per cent of the sheet metal jobs it does. It does a lot of industrial construction jobs. While the respondent encounters interferences more often on that type of work, it is able often to use drawings prepared for a job by the clients' engineers or draughtspersons to serve the purpose of interference drawings. The respondent admits that the interference drawings for the Hotel Dieu Hospital were not prepared by sheet metal workers employed under terms and conditions of the Agreements. Rather, they were prepared by the staff of the respondent's engineering department.

9. Interference drawings serve other uses as well. It was common to all witnesses who had used and/or prepared them that the drawings become the source of the dimensions and shapes of the various sheet metal fittings for duct work, such as elbows, tees and flanges which are fabricated on the job site or in an off-site shop. That information is used to prepare what most witnesses referred to as fab sheets. These are dimensioned drawings, done in a single plane, of various sheet metal shapes required for the job. The fab sheets are used for the shop fabrication of the parts. The parties agree that Exhibit #5 in these proceedings displays such drawings. It is a series of free-hand and mechanical drawings of a rather elementary nature and not drawn to scale. When interference drawings are not available, fab sheets are prepared from measurements taken in the field and usually displayed on a rough freehand drawing of the particular shape to be fabricated. Such drawings and measurements are a source of the information which goes on interference drawings as well. Exhibit #4 in these proceedings, which was admitted by agreement of the parties, was put

forward by the respondent as an example of field drawings used in the preparation of fab sheets. While it was not proven to have been prepared for that purpose, Mr. Robert Belleville, the business agent and business manager of Local 47 over some 18 years until October 1, 1987, acknowledged that Exhibit #4 looked like something drawn on site and could be a "field sketch" as in Clause 19(1) of the Ottawa Appendix of the Agreements. Similarly he acknowledged that Exhibit #5 could be called a "shop sketch" as in clause 19(1), but he considered the normal term for such drawings to be "fab sheet".

10. Interference drawings are prepared either on background drawings, made for the purpose, which show the architectural and structural elements of the building or on the engineering drawings which are part of the contract material. When interference drawings are prepared, they also serve uses other than fabricating and erecting the sheet metal. For example, the respondent uses them to prepare a labour plan for a job and for scheduling a job. The respondent and other contractors also used them for "as built" drawings. These are drawings which are given to the building owner to show how the building was actually built, as compared with its design.

11. When drawings like Exhibits #4 and #5 are compared with an interference drawing like Exhibit #3, even allowing for the fact a number of witnesses said that some fab sheet drawings are more detailed and sophisticated than Exhibit #5, there is a very substantial difference in their complexity and the amount and variety of detail shown. The drawings in Exhibits #4 and #5 are quite simple and elementary compared with the interference drawing which is Exhibit #3. It is drawn to scale and displays the location of the sheet metal duct work and heating, ventilating and air conditioning equipment in relations to the architectural and structural features of the particular area of the hospital building illustrated by the drawing. The drawing displays such detail as the dimensions of the duct work and sheet metal fittings, the elevation of the duct work relative to the floor level, its slope and the angles or radii of its bends. None of the witnesses who were knowledgeable in heating, ventilating and air conditioning systems hesitated to say that drawings like those in Exhibits #4 and #5 were not interference drawings and would be caught by the words "shop and field sketches" from Clause 19.1 of the Ottawa Appendix of the Agreements. If the same could be said of Exhibit 3, there would be no grievance to arbitrate. Not surprisingly, all but one of Local 47's witnesses took the position that interference drawings like Exhibit #3, and even more detailed and complex ones, fell within that clause, while the respondent's witnesses expressed the opposite view.

12. Respondent counsel asked the Board to conclude from the stark contrast drawn by comparing the interference drawing in Exhibit #3, and others like it in evidence, with the drawings in Exhibits #4 and #5 and the ease with which all witnesses distinguished interference drawings from them, that the words "...the preparation of all shop and field sketches used in fabrication and erection;..." used in clause 19.1 do not include the preparation of interference drawings, and it would be foolish to say they did. Counsel for Local 47, on the other hand, argues that those words are broad enough to encompass interference drawings of the kind in evidence whether or not the Board were to agree with respondent counsel that the drawing in Exhibit #3 is a quantum leap from those in Exhibits #4 and #5.

13. Each counsel contends that the words "...the preparation of all shop and field sketches used in fabrication and erection;..." in Clause 19.1 of the Ottawa Appendix of the Agreements are clear and unambiguous and support their respective and opposite conclusions. Each argued, in the alternative, however, that the Board should rely on the extrinsic evidence as an aid in applying the language of the Agreement to the facts should the Board find the application of that language to the facts to be unclear. They agree that the general standard for admitting and relying upon extrinsic evidence, with respect to the specific language at issue, is that set in *Leitch Gold Mines Limited*



*et al. v. Texas Gulf Sulphur Inc. et al.*, (1969) 1 O.R. 469, cited and affirmed by the Ontario Court of Appeal in *Noranda Metal Industries and International Brotherhood of Electrical Workers*, (1984) 44 O.R. (2d) 529:

Where the language of the document and the incorporated manifestations of initial intention are clear on a consideration of the document alone and can be applied without difficulty to the facts of a case, it can be said that no patent ambiguity exists. In such a case, extrinsic evidence is not admissible to affect its interpretation. On the other hand, *where the language is equivocal, or if unequivocal but its application to the facts is uncertain or difficult, a latent ambiguity is said to be present*. The term "latent ambiguity" seems now to be applied generally to all cases of doubtful meaning or application.

[emphasis added]

14. The Board in *The Brant County Board of Education*, [1984] OLRB Rep. Oct. 1349, at paragraph 4, commented as follows on the *Noranda Metal* case in relying on it to admit extrinsic evidence of the negotiating history of the parties to a provincial agreement:

...the Court of Appeal in the *Noranda Metals* case at page 536 has condoned the utilization of the opportunity to explore evidence of the negotiating history to reveal a latent ambiguity and then clarify the meaning of collective agreements. This then assists in applying the language of the contract to the facts of the case.

The question for the Board in the instant case is whether the language of Clause 19.1 of the Ottawa Appendix to the Agreements and the language of Article 29 of the Body of Agreement in the 1988-90 Agreement includes the preparation of interference drawings when neither expressly refers to such drawings. The parties have presented two different interpretations of the language of clause 19.1 and the language itself is ambiguous as to whether "shop and field sketches" includes "interference drawings". The language can be read exclusively and narrowly to exclude them because they are not expressly included, or it can be given an expansive and inclusive reading to include them along with any drawing that is used in the shop or in the field for the fabrication and installation of sheet metal. With respect to Article 29, the language at issue is not equivocal. It says that the parties to the 1988-90 Agreement have agreed that it "...covers the rates of pay, rules and working conditions..." of employees of the employer engaged in the work specified in clauses (a) to (r) of Article 29 "...and all other work included in the jurisdictional claims of the Sheet Metal Workers International Association;...". Those parties have agreed also that employers shall employ on that work "[o]nly certified journeymen and registered apprentices and other qualified sheet metal workers recognized by the local union." Local 47 is the "local union" for the purpose of that language in this case. The problem arises in applying the language of Article 29, particularly the "and all other work" basket clause, to the facts in this case, exclusive of the extrinsic evidence. The 1988-90 Agreement does not expressly identify the jurisdictional claims of the Association, making it uncertain and difficult to apply the language to the facts.

15. Therefore, the Board is satisfied that there is an ambiguity in the face of the language of the Agreements which is at issue in this grievance. Accordingly, it is appropriate in this case for the Board to consider the extrinsic evidence adduced in these proceedings of past practice respecting preparation of interference drawings, past collective agreements and the negotiating history of the parties.

16. The words "...the preparation of all shop and field sketches used in fabrication and erection;..." appearing in the Ottawa Area appendix of the Agreements pre-date the first sheet metal workers provincial agreement. The words were introduced as clause 3.3(d) of the 1971-73 collective agreement between Local 47 and the MCA-Ottawa. Robert Belleville was a business agent for Local 47 and a member of its bargaining committee when the clause was negotiated. He

remained the local's business agent until 1979 when he became business manager, a position he held until 1987. Belleville was on Local 47's bargaining committee for negotiations with MCA-Ottawa in 1973, 1975 and 1977, the last negotiations before provincial bargaining began in 1978. Clause 3.3(d) remained unchanged through those negotiations. He testified that Local 47's members had been preparing interference drawings prior to 1971 and the local has had jurisdiction over the work since 1971. He claims that, in the 1971 negotiations, the employers' bargaining committee agreed that clause 3.3(d) included preparation of interference drawings even though there is no specific reference to interference drawings in the clause. Neither Belleville nor any other witness testified about the advent of the words "...and all other work included in the jurisdictional claims of the Sheet Metal Workers' International Association,..." which are now part of Article 29 of the Body of the 1988-90 Agreement. They form part of clause 3.3(e) of the 1971-73 agreement. It may be seen from comparing it with its predecessor 1969-71 agreement that the same clause was not included in the earlier agreement. However, Clause 3.1 of Section 3.0 - Recognition of that agreement includes similar words. It reads:

#### RECOGNITION

3.1 The terms of this agreement are hereby recognized and accepted as binding on both parties hereto and shall apply in the manner and under conditions specified herein to the manufacture, fabrication, assembling, handling, hoisting, erecting, and/or installation, dismantling, reconditioning, adjustment, alteration, repairing and servicing of all sheet metal work of No. 10 U.S. or its equivalent or lighter gauges, *and all other work in connection with air displacement systems or incidental thereto included in the jurisdictional claims of the Sheet Metal Workers' International Association*, and none but journeymen sheet metal workers and registered apprentices, recognized by Local Union 47 shall be employed on said work by the employers. The above specified work must be executed within the geographic area of this agreement, regardless of prevailing wage rates that exist in other areas.

[emphasis added]

17. That clause was amended in the 1971-73 collective agreement and became part of Clause 3.3 - Recognition of Jurisdiction in Clause 3 - Recognition. Clause 3.3 states as follows:

#### 3.3 - RECOGNITION OF JURISDICTION

The terms of this agreement are hereby recognized and accepted as binding on both parties hereto and shall apply in the manner and under conditions specified herein to the

- (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alternation, repairing and servicing of all ferrous or non ferrous metal work of U.S. No. 10 gauge or its equivalent or lighter gauge and all other materials used in lieu thereof and of all airveyor systems and air handling systems regardless of material used including the setting of all equipment and all reinforcements in connection therewith;
- (b) all lagging over insulation and all duct lining;
- (c) testing and balancing of all air-handling equipment and duct work;
- (d) the preparation of all shop and field sketches used in fabrication and erection;
- (e) *all other work included in the jurisdictional claims of Sheet Metal Workers' International Association*, and none but journeymen sheet metal workers and registered apprentices, recognized by Local Union 47 shall be employed on said work by the employers, excepting the loading and unloading by the company truck driver for transportation purposes only. The above specified work must be executed within the

geographic area of this agreement, regardless of prevailing wage rates that exist in other areas.

[emphasis added]

The clause remained unchanged through the last collective agreement between Local 47 and the MCA-Ottawa prior to provincial bargaining and then became part of the Ottawa Appendix of the provincial agreement. It appears as clause 19.1 of Clause 19 - Trade Jurisdiction of the 1986-88 Agreement which states:

Clause 19 - TRADE JURISDICTION

19.1 The terms of the Body of this Agreement and of this Appendix "E" are hereby recognized and accepted as binding on the Local Trade Association and Local Union No. 47 and shall apply in the manner and under the conditions specified therein to the:

- (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing, and servicing of all ferrous or non-ferrous metal work and all other materials used in lieu thereof and of all airveyor systems and air handling systems regardless of material used including the setting of all equipment and all reinforcements in connection therewith;
- (b) all lagging over insulation and all duct lining;
- (c) testing and balancing of all air handling equipment and duct work;
- (d) the fabrication and installation of computer floors;
- (e) *the preparation of all shop and field sketches used in fabrication and erection;*
- (f) *all other work included in the jurisdictional claims of Sheet Metal Workers' International Association*, and none but journeymen sheet metal workers and registered apprentices, recognized by Local Union 47 shall be employed on said work by the employers, excepting the loading and unloading by the employer's truck driver for transportation purposes only. The above specified work must be executed within the geographic area of this Appendix, regardless of prevailing wage rates that exist in other areas.
- (g) the employer shall endeavour to procure and embrace on his job, contract and specifications, all sheet metal work, ventilation and air-conditioning work including balancing and all apparatus and equipment required for the complete installation of same.

[emphasis added]

When the employee and employer bargaining agencies bargained the 1988-90 Agreement, Article 29 - Trade Jurisdiction was added to the Body of Agreement. Clauses (a) through (r) which are quoted above at paragraph 6 were based on work which was included in the Trade Jurisdiction Clauses of the various Local Appendices which the parties were prepared to make binding on all of the employers, local trade associations and affiliated bargaining agents bound by the Agreement. They did not agree to include Clause 19.1(e) of the Ottawa Appendix of the 1986-88 Agreement.

18. Belleville was the only member of Local 47's 1971 bargaining committee who testified about the 1971 negotiations and the 1973, 1975 and 1977 negotiations. Ray Guertin, Belleville's predecessor as business manager had been on Local 47's committee during those negotiations and died a few years prior to these proceedings. Ross Mitchell, the present business manager of the local was a member of Local 47's bargaining committee during those years as well. He was present throughout the proceedings, but did not testify. The Board heard the testimony of several members of MCA-Ottawa's bargaining committees. Leonard Fraser, who testified for Local 47 under



summons, was a member of the committee which represented MCA-Ottawa in the 1973 and 1975 negotiations. John Robertson, Uri Goldberg, Terry Burchell and Robert Irving testified for the respondent. All except Burchell were owners or management representatives of contractors who employed members of Local 47. Burchell was the senior full-time, paid executive of MCA-Ottawa. He testified about all of the above negotiations, but was not at the 1971 negotiations with Local 47. Robertson was a member of the 1973 and 1975 committees; Goldberg was a member for all four negotiations; and Irving was Chairman of the 1971 committee and a member of the 1973 committee.

19. Neither party was able to produce in evidence the wording of Local 47's original proposal for what became clause 3.3(d) of the 1971-73 collective agreement. Nor did any of the witnesses who testified about the 1971 negotiations claim to recall the wording of the proposal. Fraser recalled that interference drawings were discussed when clause 3.3(d) was negotiated, but he was unsure whether the parties intended that they be covered by the language finally adopted. He had no recollection that the parties arrived at an understanding that interference drawings were covered by the clause. Goldberg could not recall the word "sketches" being part of Local 47's original proposal, but he recalled that Local 47 wanted general drafting to be included in the wording of the clause. The MCA-Ottawa bargaining committee disagreed and the parties eventually agreed to language which refers to neither drafting nor drawing. Irving denied that Local 47 had taken the position in the 1971 negotiations that clause 3.3(d) was broad enough to include interference drawings or that the MCA-Ottawa bargaining committee had assured Local 47 at the bargaining table that the wording finally agreed covered such drawings. Irving testified also that the parties had agreed to language for clause 3.3(d) which would have incorporated interference drawings, but deleted it in the final stages of bargaining as a trade off for an additional wage settlement. His description of the context in which that occurred was quite specific. While the Board does not doubt that his testimony on that point was his best recall eighteen years later, neither Fraser nor Goldberg made reference to the circumstances described by Irving. Also, while Burchell was not present at the bargaining table in 1971, he would have been involved in part of the process described by Irving. Burchell's evidence lacks any reference to the circumstances. In the Board's view, the events described by Irving are of a nature that Fraser, Goldberg and Burchell, or at least one of them, would have recalled and related the events described by Irving had they occurred. In these circumstances, the Board does not rely on Irving's evidence on how the language of clause 3.3(d) was settled.

20. Robertson, Goldberg and Burchell testified also that the topic of whether the preparation of interference drawings was covered by the terms of the collective agreement between MCA-Ottawa and Local 47 was discussed during the three rounds of bargaining after 1971, either as a formal proposal of Local 47 to expand the agreement language to include sheet metal drafting so as to include interference drawings, or in connection with other work jurisdiction issues. Their evidence, however, does not go so far as to claim that Local 47 acknowledged that clause 3.3(d) did not include interference drawings.

21. Belleville testified that, after 1971 when clause 3.3(d) became part of the collective agreement between MCA-Ottawa and Local 47, contractors bound to the agreement and its successors observed clause 3.3(d) and used sheet metal workers to prepare interference drawings when the contractor required them to be prepared. Had that not been the case, he testified, Local 47 would have filed a grievance and none had been filed until the one at hand. The only problem Local 47 encountered until this grievance, according to Belleville, was in 1976 with Comstock International Ltd. ("Comstock"), a major sheet metal contractor in the Ottawa Area. The problem arose as a result of Comstock using persons who were not in the bargaining unit of the collective agreement to prepare sheet metal interference drawings. It began when Belleville sent a telex

to Comstock stating that he would file a grievance unless Comstock ceased using "...non-members of Local 47 in [Comstock's] drafting dept...". When Rudy Jetzelsperger, manager of Comstock's mechanical department, contacted Belleville for clarification of his complaint, he learned that the problem involved the use, for sheet metal work, of interference drawings prepared in Comstock's draughting office by persons who were not Local 47 members. According to Jetzelsperger, Comstock had experienced prior difficulties with Local 47 over the use of interference drawings not prepared by its members. Therefore, when he and Belleville were unable to resolve the dispute, he told Belleville to proceed with a grievance so that the issue of whether Local 47 had jurisdiction under the collective agreement could be resolved once and for all. Belleville's response was that Local 47 would not file a grievance but would tell its members to prepare fabrication sheets only from original mechanical drawings and to install sheet metal only from drawings prepared by Local 47 members. Original mechanical drawings are the drawings supplied to the sheet metal contractor with the contract documents. Local 47 did not file a grievance. It did instruct one of Comstock's sheet metal employees not to prepare fabrication sheets from drawings prepared by Comstock. Comstock advised Local 47 that it would treat the employee's refusal to work from its drawings as a quit and would hold Local 47 liable in damages if it did not withdraw its instruction. The dispute came to an end eight weeks later when Comstock agreed that it would not use persons who were not members of Local 47 to prepare interference drawings.

22. The events leading to the filing of this grievance bear some similarity to the Comstock incident. Robert Laframboise was informed by Barry Arbuthnot, the respondent's sheet metal manager, that the respondent's sheet metal workers on the Hotel Dieu project had been told by Local 47 not to install duct work from interference drawings which had not been prepared and initialled by a Local 47 member. Laframboise instructed Arbuthnot to fire anyone refusing to work from the respondent's interference drawings. Later Laframboise and two of his managers met with Mitchell and Terry Belleville, a Local 47 business representative. They told Laframboise that there would be no problem if the employee who was preparing the drawings joined Local 47. The drawings were being prepared by an employee in the respondent's engineering department. When Laframboise rejected their suggestion, he was told that "things could go the same way [for the respondent] as they had for Comstock in 1976". Laframboise replied that the respondent was following the collective agreement and, if they disagreed, they should file a grievance.

23. There was other evidence that the parties to the 1971-73 collective agreement differed over whether clause 3.3(d) required that interference drawings be prepared by employees in the bargaining unit of the agreement. The clause was subject matter of a meeting of the Joint Conference Committee on December 14, 1972. It is a committee established under the collective agreement and is composed of three members from each of the parties to the agreement. The minutes state that the Joint Conference Committee was meeting "...to carry on a dialogue between the two parties in an attempt to retain an harmonious working relationship by attempting to clarify items in the current Collective Agreement.". They also record each party's interpretation of clause 3.3(d). Local 47's interpretation was stated to be that, when interference drawings are provided and used on the job for erection of sheet metal, they should be drawn by Local 47 members. The MCA-Ottawa interpretation was that interference drawings used on the job for erection of sheet metal could be drawn by non-members of Local 47.

24. The evidence of both parties leaves no doubt that, after clause 3.3(d) became part of the 1971-73 collective agreement, contractors bound to that agreement and any of its successors through to the Agreements, employed members of Local 47 to prepare interference drawings. A few of the contractors had been using Local 47 members for that purpose prior to the 1971 agreement. Some of the sheet metal workers who testified for Local 47 began doing interference drawings during their apprenticeship, although preparation of the drawings was not part of the drafting



training they took as part of their apprenticeship. The preparation of interference drawings is not part of the apprenticeship requirements for the sheet metal workers trade under the *Apprenticeship and Tradesmen's Qualification Act*. The drafting which they do as part of their training is quite rudimentary relative to the drafting involved in the preparation of interference drawings. Local 47 sheet metal workers employed by several of the largest sheet metal contractors in the Ottawa area, Comstock, Rexway Sheet Metal (Ottawa) Ltd. and Sayers & Associates Limited, prepared 90 to 95 per cent of the interference drawings which those contractors required be prepared for the installation of sheet metal. Those same contractors, however, have used persons who were not sheet metal workers in the bargaining unit of the Agreements or their predecessors (hereafter "the Local 47 bargaining unit").

25. Comstock used two estimators, Nick Burgess and Jacques Joly, and Barry Riddell, an engineering technician, to prepare interference drawings. Riddell was used for this purpose until 1975. Joly was used for preparation of interference drawings from 1983 to 1988. Burgess prepared them off and on from 1976 to 1980 as an estimator and again in 1985 as a project manager. He was out of the Ottawa area between 1980 and 1985. Clearly, Comstock's practice did not end, as Belleville testified, with the 1976 incident.

26. Rexway used interference drawings for projects in the Ottawa area prepared in a variety of circumstances by persons other than sheet metal workers in the Local 47 bargaining unit or by persons employed under terms and conditions other than those in the prevailing collective agreements between Local 47 and the MCA-Ottawa. From 1972 until province-wide bargaining in 1978, some of the drawings were prepared in the Toronto office of Watts & Henderson Limited ("Watts & Henderson"). Ray Steeles, a design draftsman in the Toronto office, prepared ninety per cent of the interference drawings required for the L'Esplanade Laurier project in 1973. Watts & Henderson was described to the Board as the owner of Rexway which was Watts & Henderson's sheet metal contractor. Rexway performed sheet metal contracts exclusively for Watts & Henderson. Even were the Board to treat Watts & Henderson and Rexway as one employer for purposes of the Act, the drawings prepared in Watts & Henderson's Toronto office were prepared outside of the geographic scope of Local 47's collective agreements with the MCA-Ottawa. Clause 19.1 of the Ottawa Appendix of the Agreements explicitly requires that work specified in the clause "...must be executed within [Local 47's geographic jurisdiction]". Almost identical language was part of clause 3.1 of the 1969-71 collective agreement, prior to the adoption of the language in dispute. It remained in the 1971-73 collective agreement as part of clause 3.3(e) when the parties adopted clause 3.3(d), and in successive agreements after that. Therefore, all drawings prepared in the Toronto office of Watts & Henderson were drawings prepared under terms and conditions other than those of the prevailing collective agreement between Local 47 and the MCA-Ottawa. Between 1975 and 1980, Barry Riddell prepared interference drawings for Rexway's use on several large commercial and institutional projects as an employee of both Rexway and Watts & Henderson. Between 1975 and 1988, Rexway used interference drawings prepared by individual contractors engaged under lump sum contracts. They were Sam Clemmann, Jean-Marie Bouchard, Gerry Kincaid, Alain Breton and Marc Carriere. The drawings were for large commercial and industrial projects. The value of the lump sum contracts was unrelated to any payments required by collective agreements with Local 47.

27. Between 1971 and 1973, Sayers subcontracted the preparation of interference drawings to draftsmen employed by an engineering firm.

28. Other sheet metal contractors bound to the Agreements and their predecessors have used persons other than employees in the Local 47 bargaining unit to prepare interference drawings or persons employed under terms and conditions other than those in the prevailing collective



agreements between Local 47 and the MCA-Ottawa. Napko Contractors Inc. had interference drawings prepared by its chief draughtsman, Dave Parkinson and, during 1973-76, by Ellard MacKnight, a supervisor. Megatech Contracting Ltd. has subcontracted the preparation of interference drawings on a fixed price basis since it began business in 1981. For that purpose, it has used Barry Riddell, Alain Breton, Sylvio Paquette and Peter Davies. They prepared drawings for major commercial and institutional projects between 1981 and the making of this application. Breton and Paquette have their own companies. When Breton bids and takes work for the preparation of interference drawings, he does so in the name of his company, MCI Services. While Paquette testified that he made little use of his company S. Paquette Drafting, Megatech has paid invoices from that company for drafting work. As noted earlier, Riddell was not an employee in the Local 46 bargaining unit; nor was Davies. Megatech also uses one of its employees, a mechanical engineer, to prepare interference drawings.

29. Airgo Mechanical Limited has infrequent need for interference drawings because of the nature of its projects. When the need arises, the drawings have been prepared by either its owner, Uri Goldberg, or a supervisor. The form of drawing used was an overlay sketch on an engineering drawing of the part of the project affected. Bargaining unit employees have prepared fabrication sheets from these drawings, but have not done the drawings.

30. Interference drawings used by Irving Contracting Limited have been prepared by the four Irving brothers who own or manage the company and by Cleo Hodgins and Ted Turnbull. Hodgins is a shop supervisor and Turnbull is a job supervisor.

31. The respondent is a multi-trade contractor and has an engineering department. When the respondent has required interference drawings to be prepared for sheet metal work, they were drawn by employees of its engineering department. Sheet metal work makes up approximately 20 per cent of its business and it is the fifth largest sheet metal contractor in Local 47's geographic jurisdiction. Robert Laframboise, its owner and president, estimates that interference drawings are required on 10 to 15 per cent of its sheet metal jobs. When they are required, the majority are drawn by engineers, engineering technicians and draughtspersons. The respondent has subcontracted the preparation of interference drawings twice to company's not bound to a collective agreement with Local 47. There is a conflict in the evidence of Laframboise and Paquette about whether Paquette prepared interference drawings for the respondent on two projects and whether, as Laframboise claims, Paquette was the respondent's project manager on a third project when he prepared interference drawings for it. Paquette testified that he prepared interference drawings on three projects within Local 47's geographic jurisdiction for the respondent. These were the Alexandria Footwear Plant, Seafarers' Training Institute and Parks Canada jobs. The first two were during his first term of employment with the respondent. The third one was the first job of his second term. Paquette stated that he was hired for those jobs out of Local 47's hiring hall and that he jumped the out-of-work list because he was hired to "draught" the jobs. His evidence conflicts with that of Laframboise. Laframboise testified that interference drawings were not required for the first two jobs and none were prepared. There is no dispute that Paquette did at least four interference drawings for the third job, but Laframboise testified that Paquette was project manager for the job and not in Local 47's bargaining unit. It is unnecessary to resolve the conflict because, even were the Board to prefer Paquette's evidence, he had been employed during that time on terms and conditions other than those in the collective agreement (see paragraph 32). So, whichever way the conflict might be resolved, there would be no evidence of the respondent having employed sheet metal workers under the terms and conditions of the collective agreements between Local 47 and the MCA-Ottawa since becoming bound to the 1973-75 agreement.

32. When contractors used sheet metal workers to prepare interference drawings, in most

instances they were employed under the terms and conditions of the prevailing collective agreement, based on whether they were apprentices, journeymen or working foremen. There is evidence of some employees receiving payments extra to those called for by the collective agreement. For example, when Breton was an employee of Comstock and performing sheet metal draughting work, he was paid for all time off and he believed the others doing that work were similarly treated. At Sayers Associates, he was paid an extra four hours per week without being required to work the time. Paquette was paid "extras" when he worked for the respondent on two separate occasions for a total of approximately five years. Throughout this period his pay was based on the foreman's rate in the collective agreement. The "extras" were in the form of travelling expenses, accommodation and pay for time not worked. The first period of employment by the respondent was in 1981 for approximately six months. The second term began in 1983 and lasted approximately four and a half years. During both terms the respondent provided accommodation at its cost, either in a company trailer or a motel, over and above any room and board allowance provided for in the collective agreement. During the first term, Paquette also was paid 50 dollars per week travelling expense. During the second term, he was paid a salary based on the foreman's rate in the collective agreement, but calculated at an extra four hours per week. He was not required to work the extra time. The majority of the time during the second period of employment, Paquette worked on projects outside of Local 47's geographic jurisdiction.

33. When Alain Breton prepared interference drawings for Rexway and Megatech under lump sum contracts, the contracts were with Breton's company MCI Services. MCI is bound to the Agreements. Breton is a member of Local 47, the owner of MCI and its sole employee. MCI makes monthly contributions to Local 47's welfare and pension plans at the minimum monthly rate required to maintain Breton's benefits. Employers of employees in the Local 47 bargaining unit contribute to those plans for the employees at a rate per hour stipulated by the Agreements. MCI has no employees other than Breton. He does all of the draughting when MCI takes a contract for the preparation of interference drawings. As owner of MCI, he is not an employee within the meaning of the Act and cannot be an employee in Local 47's bargaining unit. This is consistent with MCI having made the minimum contributions to the welfare and pension funds under the applicable collective agreements for Breton to maintain Breton's eligibility for coverage, instead of making contributions at the rates per hour stipulated by the fund for employees in the bargaining unit.

34. The Board will not set out the submissions of counsel. It has reviewed carefully their submissions together with the evidence of the 21 witnesses and the 60 exhibits filed by the parties in reaching the conclusions set out herein.

35. Local 47 bases its primary argument in support of its claim to jurisdiction over the preparation of interference drawings on the words "...the preparation of all shop and field sketches used in fabrication and erection;...", as they appear in Clause 19.1 of the Ottawa Appendix of the Agreements. They have been part of the trade jurisdiction provisions of collective agreements between or binding upon the MCA-Ottawa, its member sheet metal contractors and Local 47 since the 1971-73 collective agreement when they were introduced as clause 3.3(d). While the facts about the extent to which sheet metal contractors bound to successive collective agreements between Local 47 and the MCA-Ottawa since the 1971-73 agreement have used Local 47 members employed under the terms and conditions of the prevailing collective agreement to prepare interference drawings tends to support Local 47's claim that the practice was and is a requirement of those agreements, those facts do not establish conclusively that it is a practice required by the Agreements and their predecessors. There are other facts which tend to deny Local 47's claim and support the conclusion that the words relied upon do not oblige the contractors to have interference drawings prepared by sheet metal workers employed under the terms and conditions of the



prevailing agreement. These are the bargaining history surrounding the words of clause 3.3(d) of the 1971-73 agreement currently part of Clause 19.1 of the 1988-90 Agreement; the practice, since the 1971-73 Agreement, of sheet metal contractors, including the several largest contractors who employ Local 47 members extensively for the preparation of interference drawings, employing persons to prepare them who clearly were not employees in the Local 47 bargaining unit, or who were employed on terms other than those in the prevailing collective agreement; and, the conduct of Local 47 towards Comstock in 1976 and the respondent in the events leading up to the filing of this complaint.

36. Indeed, the facts about the bargaining history show that disagreement over whether clause 3.3(d) covered the preparation of interference drawings was evident before the expiry of the 1971-73 collective agreement. That may be seen from the divergent interpretations given the clause by Local 47 and MCA-Ottawa members of the Joint Conference Committee in December 1972 when the Committee was meeting "...to clarify items in the current collective agreement.". That issue of whether clause 3.3(d) included their preparation continued to be a topic of discussion or negotiation between Local 47 and MCA-Ottawa during successive negotiations of renewal agreements until bargaining began under the provincial bargaining scheme. There was no agreement that clause 3.3(d) did or did not include the preparation of interference drawings. The parties simply agreed to disagree on that issue. This is consistent with the testimony of Robertson, Goldberg and Irving that there was discussion about the preparation of interference drawings and general drafting before the parties settled on language which made no reference to either; Irving's denial that MCA-Ottawa either agreed that the clause was broad enough to include the preparation of interference drawings or assured Local 47 at the bargaining table that the wording finally agreed covered that work; and, Fraser's uncertainty whether the parties intended interference drawings to be covered by clause 3.3(d).

37. The fact that, beginning with the 1971-73 collective agreement through to the 1988-90 Agreement, sheet metal contractors such as Comstock, Rexway, Airgo, Irving, Megatech, Napko and the respondent have used persons who clearly were not employees in the Local 47 bargaining unit to prepare interference drawings, or who were employed on terms and conditions other than those in the prevailing collective agreement, including employment under lump sum contracts, is consistent with MCA-Ottawa having neither agreed in the 1971 negotiations that clause 3.3(d) included the preparation of interference drawings, nor assured Local 47 that the wording covered that work.

38. Local 47's conduct towards Comstock in 1976 and towards the respondent immediately prior to the filing of this grievance is inconsistent with its claim that, since the 1971-73 collective agreement, sheet metal contractors have recognized its exclusive jurisdiction over the preparation of interference drawings under the clause now in dispute. It was Belleville's evidence that this grievance and the 1976 Comstock incident were the only disputes with sheet metal contractors over Local 47's claim to exclusive jurisdiction. If Local 47's jurisdiction was as firmly entrenched in the language of the clause at issue as Belleville claimed, one wonders why Local 47 found it necessary to act as it did on the only two occasions in 17 years on which Local 47 admits its jurisdiction was challenged. In the case of Comstock, Local 47 chose not to file a grievance and, instead, instructed one of Comstock's employees to refuse to work from drawings not prepared by members of Local 47. In the respondent's case, prior to filing this grievance, Local 47 representatives threatened the respondent with the same action that had been taken against Comstock. Local 47's conduct is more consistent with an attempt to secure jurisdiction where the contractual claim to jurisdiction is uncertain.

39. Local 47 counsel argued, in part, that the exceptions to interference drawings being pre-



pared by Local 47 members employed under the terms and conditions of its collective agreements with MCA-Ottawa were few and they occurred under circumstances in which Local 47, exercising reasonable diligence, either could not have known of them or could not have grieved them successfully even if it had been aware of them. Counsel offers several reasons to support his contention. Most of the persons in jobs outside of the Local 47 bargaining unit who prepared interference drawings or who did them for a fixed price were members of Local 47. For many of them, the contractor was continuing to make full contributions to the Local 47 welfare and pension funds and deducting union dues. For similar reasons, Local 47 could not have known, even with reasonable diligence, about the extras paid to some of the persons who prepared sheet metal interference drawings. In respect of persons outside of the bargaining unit, counsel argues that, even if Local 47 had been aware that they were doing work covered by the collective agreement, Local 47 could not have grieved successfully because the agreement does not expressly prohibit that practice. Finally, with respect to interference drawings prepared in the Toronto office of Watts & Henderson for Rexway, counsel submits that it cannot grieve work done outside of its geographic jurisdiction by an employer who may be the responsibility of another local of the Sheet Metal Workers' Association. For these reasons, he argues, these exceptions do not establish grounds for finding that, by its conduct, Local 47 has waived its claim to exclusive jurisdiction over preparation of interference drawings under clause 19.1 of the Agreements.

40. That might be a matter for the Board to decide if it was dealing with a defence to the grievance based on a claim that Local 47 was estopped from relying on an unambiguous, express condition of the collective agreement. However, that is not the issue. The question for the Board is whether the phrase "...preparation of all shop and field sketches used in fabrication and erection; ..." in Clause 19.1 of the 1988-90 Agreement includes the preparation of sheet metal interference drawings or, in the alternative, whether their preparation is captured by the requirement of Article 29 of the 1988-90 Agreement which says that certified journeymen sheet metal workers and registered apprentices and other qualified sheet metal workers recognized by Local 47, shall be employed on "...all other work included in the jurisdictional claims of Sheet Metal Workers' International Association". It is undisputed that, if either provision includes the preparation of interference drawings, all of the terms and conditions of the Agreements apply to employees who perform the work. In turn, that would make the respondent in contravention of the Agreements because it has admitted that interference drawings for the Hotel Dieu Hospital were not prepared by sheet metal workers in the Local 47 bargaining unit under the terms and conditions of the Agreements.

41. Extrinsic evidence of past practice and bargaining history is a useful aid to resolving ambiguities in collective bargaining language to the extent that it reveals through later events what was the state of mind of each party to the agreement when they agreed to language, the meaning of which is later disputed. Having regard to the dispute in this case over the meaning of Clause 19.1 of the 1988-90 Agreement, it is not surprising that there is extrinsic evidence which tends to support each party's interpretation of the clause. The extent to which sheet metal contractors have employed sheet metal workers under the terms and conditions of the prevailing collective agreements to prepare interference drawings, from and including the 1971-73 agreement to the 1988-90 Agreement, favours the conclusion that the parties had agreed in 1971 that the preparation of interference drawings was included in the words "...shop and field sketches used in fabrication and erection...", which are now part of Clause 19.1 of the Ottawa Appendix of the 1988-90 Agreement. The past collective agreements, the bargaining history respecting those words, the practice since the 1971-73 collective agreement of contractors having interference drawings prepared by persons who clearly were not in the Local 47 bargaining unit and by persons employed under terms and conditions other than those in the prevailing collective agreement, and Local 47's conduct towards Comstock in 1976 and the respondent immediately prior to the filing of this grievance, on the other hand, favour the conclusion that there was no agreement in 1971, or subsequently, that

clause 19.1 included the preparation of interference drawings. While each of the factors favouring that conclusion, taken individually, is not conclusive in the face of the extent to which contractors have employed sheet metal workers to do that work under the terms and conditions of the prevailing collective agreements, their cumulative effect persuades the Board to the view that there was no agreement in 1971, or subsequently, that the words "...shop and field sketches used in fabrication and erection..." now in Clause 19.1 of the Ottawa Appendix of the Agreements. Accordingly, the Board finds that Clause 19.1 of the Ottawa Appendix of the 1988-90 Agreement does not bring the preparation of interference drawings under the terms of the Agreement.

42. The Board finds support for its conclusion that an interference drawing is not a shop or field sketch within the meaning of that clause from the ordinary meaning of the word "sketch". A sketch is usually a rough depiction of some object or scene, outlining the main features but not the details of what it depicts; for example, the drawing made by an artist in the field which later becomes the basis for a finished canvas, or part of it. The drawings which are Exhibits #4 and #5 in these proceedings are more in keeping with that ordinary meaning. Those drawings are of individual sheet metal fittings, drawn in a single plane, not to scale and may be freehand or mechanical. On the other hand, Exhibit #3, which the parties agree is an interference drawing from the respondent's Hotel Dieu Hospital project, and the other interference drawings in evidence are complex, detailed mechanical drawings, drawn to scale and showing the location of sheet metal duct work and heating, ventilation and air conditioning equipment in relation to other services like plumbing and electrical services, and to the architectural and structural features of the particular area of a building in which they are being installed. They show the systems of which fittings of the type shown in drawings like Exhibit #4 and #5 form only parts and they show it in all of the detail necessary for proper installation of such fittings. In the Board's view, those drawings are not in keeping with the ordinary meaning of the word "sketch".

43. It remains for the Board to determine whether the basket clause "...and all other work included in the jurisdictional claims of the Sheet Metal Workers' International Association." in Article 29 - Trade Jurisdiction in the Body of Agreement of the 1988-90 Agreement includes the preparation of sheet metal interference drawings. If the basket clause includes that work, then the "...rates of pay, rules and working conditions..." of the 1988-90 Agreement apply to "...all employees of the employer engaged in..." the preparation of interference drawings, and the employer shall employ "...[o]nly certified journeymen and registered apprentices and other qualified sheet metal workers recognized by the local union..." on that work. The past collective agreements show the basket clause, in its present form, to have been introduced in the 1971-73 agreement as clause 3.3(e) at the same time as the other disputed wording from clause 19.1 was introduced as clause 3.3(d). Unlike clause 3.3(d), however, clause 3.3(e) has its antecedent in the emphasized wording of the quotation at paragraph 16 above from clause 3.1 of the 1969-71 collective agreement between Local 47 and the MCA-Ottawa. Yet it was Belleville's evidence that Local 47 acquired jurisdiction over the preparation of interference drawings in 1971 with the introduction of clause 3.3(d). It was also his evidence that, prior to this grievance, with the exception of the 1976 Comstock incident, sheet metal contractors bound to the 1971-73 agreement and its successors observed clause 3.3(d) and used employees in the Local 47 bargaining unit to prepare interference drawings when they were required by the contractors. Belleville made no reference to the basket clause in his evidence in support of Local 47's claim to jurisdiction.

44. It was part of Belleville's evidence that Local 47 pursued and secured jurisdiction under the 1971-73 agreement because some Local 47 members already had been preparing them for some contractors for a few years. Several of the witnesses testified that they were preparing interference drawings prior to the 1971-73 agreement. Why then was it necessary to negotiate clause 3.3(d) if the basket clause includes interference drawings, particularly when, for all practical purposes, the



basket clause was part of the prior collective agreement. Furthermore, it was Belleville's evidence that the MCA-Ottawa bargaining committee assured him that clause 3.3(d) was broad enough to include the preparation of interference drawings. That assurance, if given, would have been superfluous if the basket clause already included them. The evidence provides no satisfactory explanation of why the agreement required two clauses in the same article of the agreement which, according to what Local 47 has contended here, include the preparation of interference drawings. Nor does the evidence explain why the Joint Conference Committee members bothered to discuss their conflicting interpretation of clause 3.3(d) or why Local 47 and the MCA-Ottawa bothered to continue to discuss in the next three rounds of negotiations whether clause 3.3.(d) covered interference drawings and general drafting if clause 3.3(e) did. Furthermore, while Local 47's initial notice to Comstock in the 1976 dispute does not refer expressly to clause 3.3(d) in its claim that Comstock was in breach of the collective agreement, that evidence and the *viva voce* evidence of the dispute leave no doubt that the dispute was about clause 3.3(d) and not 3.3(e). The fact that there is no evidence of Local 47 having relied on the basket clause for its claim to jurisdiction over the preparation of interference drawings until this grievance is consistent with that analysis of the past collective agreements. Finally, just as the Board has found the past practice evidence to be indicative of an employer state of mind that there was no agreement between the parties in 1971, or subsequently, that clause 3.3(d) included the preparation of interference drawings, so is it indicative of a similar state of mind respecting the basket clause.

45. Therefore, in the Board's view, the past collective agreements, the bargaining history and the past practice of the parties point towards a conclusion that the preparation of interference drawings is not included in the basket clause.

46. Counsel for Local 47 argues that the words themselves are clear, simple and unambiguous and there can be no confusion what they mean. According to counsel, they say that the Sheet Metal Workers International Association gets whatever work it claims, and, if there is any doubt what the Association's claims are or what the words mean, one only needs to look to the Association's constitution. Counsel submits that the Board is entitled in law to do so as an aid to interpreting the Agreements. In that respect counsel directs the Board's attention to Section 5 - Trade Jurisdiction of Article One of that document for the words which he claims clearly include interference drawings. The words on which counsel relies are found at the start of subsection 5(a):

*This Association has established and claims full jurisdiction over the estimating, manufacture, fabrication, assembling, handling, erecting, hanging, application, adjusting, alteration, repairing, dismantling, reconditioning, testing and maintenance of all sheet metal work, all working drawings or sketches (including those taken from original architectural and engineering drawings and sketches) used in fabrication and erection;...*

[emphasis added]

Interference drawings, counsel submits, are "...working drawings...taken from original architectural and engineering drawings...used in fabrication and erection;..." and, therefore are included in the jurisdictional claims of the Association.

47. For the Board to rely on the constitution in the manner argued by counsel for Local 47 would have the same effect as incorporating section 5 of the constitution by reference into the Agreements, or at least any of it which is not represented in the work described in clauses (a) to (r), which the parties to the 1988-90 Agreement have agreed is the trade jurisdiction of the affiliated bargaining agents bound by Article 29. The Association is one of those affiliated bargaining agents. When the designated employer and employee bargaining agencies negotiated Article 29, they consolidated into the Article work described in the work jurisdiction clauses of the various local appendices which the parties to the Agreement were able to agree should apply to all of the



local trade associations and the affiliated bargaining agents bound to the 1988-90 Agreement. A comparison of Clause 19.1 of the Ottawa Appendix of the 1986-88 Agreement with Article 29 of the 1988-90 Agreement shows that Local 47's trade jurisdiction under that Agreement was substantially expanded by the change. The work descriptions in clauses (a) to (r) are clearly language of the making of the parties to the 1988-90 Agreement and not language imported from section 5 of the constitution. One bears little resemblance to the other. Were the Board to use section 5 to interpret the basket clause as argued by Local 47 to conclude that the clause includes the work described in the quotation above from subsection 5(a) of the constitution, there would be no reason why the basket clause could not be used in the same manner to import into Article 29 any work described in section 5 which is not described in clauses (a) to (r) of Article 29.

48. It was open to Local 47 and the MCA-Ottawa to do that expressly when they negotiated the language in 1971, or the three subsequent renewals of the agreement prior to provincial bargaining, if their intent was to recognize the Association's trade jurisdiction claims expressed in its constitution. The same can be said for the parties to the Agreements. In the Board's experience, it is not uncommon to find the jurisdictional claims of a building trade union incorporated into collective agreements between the union and construction industry employers by specific reference to the union's constitution. The current provincial agreement between the designated bargaining agencies for electricians and electrical contractors is an example. For whatever reason, the parties to the 1988-90 Agreement did not do so and the Board is not prepared to do by implication that which they have not been prepared to do expressly for themselves.

49. However, that still leaves unanswered the question of what meaning the parties intended for the words "...all other work included in the jurisdictional claims of the Sheet Metal Workers International Association;...". It falls to the Board as the arbitrator to interpret those words so as to give effect to them, consistent with the context within which the words appear and with all of the other terms and conditions of the 1988-90 Agreement.

50. If the Board accepts the interpretation asserted by Local 47 counsel, the Association gets whatever work it claims for its members. Some of the contractors bound to the Agreements and the Ottawa Appendix employ plumbers as well as sheet metal workers. The respondent also employs those trades and electricians, amongst others. Surely the words do not mean that, if Local 47 claimed for its members the installation of plumbing fixtures or the placing of light fixtures, an employer would have to employ "...certified journeymen and registered apprentices and other qualified sheet metal workers recognized by [Local 47]..." and apply to those employees "...the rates of pay, rules and working conditions..." of the 1988-90 Agreement. There must be a clearer reference point than "whatever the union wants, the union gets".

51. No matter how comprehensively clauses (a) to (r) might describe the trade jurisdiction of the unions bound by Article 29, and even though the descriptions are written to be broadly inclusive, it is clear that the parties to the 1988-90 Agreement have agreed that they are not exhaustive of the trade jurisdiction of those unions. When the basket clause is considered in the context of the savings phrase "...but not limited to..." and the broadly inclusive nature of the work descriptions which follow it in clauses (a) to (r), the provision "...and all other work included in the jurisdictional claims of the Sheet Metal Workers International Association means no more, in the Board's view, than other work which is similar in nature to the work described in clauses (a) to (r) of the 1988-90 Agreement. Those Clauses describe the work which that Agreement recognizes to be the work jurisdiction of the Sheet Metal Workers International Association and its affiliated bargaining agents bound to the Agreement. The preparation of interference drawings is not work similar in nature to any of the work described in clauses (a) to (r).

52. In the result, in all of the circumstances of this grievance and for the reasons given above, the Board finds further that Article 29 of the 1988-90 Agreement does not include the preparation of interference drawings. Accordingly, since the Board has found also that Clause 19.1 to the Ottawa Appendix of that Agreement does not bring the preparation of those drawings under the terms of the Agreement, that work is not work on which the employer is required to employ "...[o]nly certified journeymen and registered sheet metal workers and other qualified sheet metal workers recognized by [Local 47]..." and apply to them "... the rates of pay, rules and working conditions..." of the 1988-90 provincial collective agreement between the Ontario Sheet Metal and Air Handling Group and the Sheet Metal Workers' International Association and Ontario Sheet Metal Workers Conference. Thus the respondent did not violate that Agreement by employing persons who were not employees in the Local 47 bargaining unit to prepare interference drawings for its Hotel Dieu Hospital project in Cornwall, Ontario.

53. These are the reasons for the Board's earlier decision dismissing this application.

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**0173-90-R; 0174-90-R Ironworkers District Council of Ontario, Applicant v. Spencer J. Hawkes Inc., Respondent**

**Certification - Construction Industry - Evidence - Membership Evidence - Practice and Procedure - Proper employee notice requiring extension of terminal date in certification application - Board permitting union to file additional membership evidence up to new terminal date**

**BEFORE:** *Ken Petryshen*, Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballentine*.

**DECISION OF THE BOARD;** September 6, 1990

1. These applications for certification came on for hearing on June 29, 1990. For the reasons expressed in a decision dated July 30, 1990, the Board consolidated these applications and directed the Registrar to fix a new terminal date. The Registrar fixed August 14, 1990, as the new terminal date for the consolidated applications and the usual Notice to Employees was posted by the respondent. Prior to the terminal date, the applicant filed additional membership evidence along with a Form 80. The respondent takes the position that the Board should not consider the additional membership evidence filed by the applicant. The parties' positions on this issue have been conveyed to the Board in writing and we note that the parties advised a Labour Relations Officer that no further representations on this issue were necessary.

2. The terminal date was extended in this matter since the Board determined that a notice problem existed which required an extension. The respondent takes the position that since the terminal date was extended for the limited purpose of giving proper notice to affected employees, the Board should not rely on any recently filed membership evidence. In support of its position, the respondent relies on *Chubb-Mosler and Taylor Safes Ltd.*, [1966] OLRB Rep. Feb. 816 where the Board refused an applicant's request to extend the terminal date for the sole purpose of permitting it to attempt to gain additional membership support.

3. Where there exists, as there did in this case, a concern with notice to employees, the Board will extend the terminal date to ensure that employees are made aware of the application and to give employees the opportunity to express their wishes in the usual form regarding repre-

sentation by the applicant. Employees are free to express their wishes, whether it be in favour or in opposition to the certification of the applicant, prior to the terminal date. In this instance, the applicant was able to file with the Board prior to the new terminal date additional membership evidence in the proper form. The Board is satisfied that there is no basis for it to reject the additional membership evidence. This is not a case where the Board extended the terminal date in order to give the applicant some additional time to secure more membership support.

4. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 12, 1978, the designated employee bargaining agency is the International Association of Bridge, Structural and Ornamental Iron Workers and the Iron Workers District Council.

5. The Board further finds that this is a consolidated application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(3) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

6. The Board further finds pursuant to section 144(1) of the Act, that all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers' apprentices in the employ of the respondent in all other sectors in the County of Wellington and the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. When the parties met with a Labour Relations Officer on June 29, 1990 prior to the hearing to review the list of employees filed by the respondent, the applicant indicated it had three challenges to the list. In its decision of July 4, 1990, the Board appointed a Labour Relations Officer to inquire into these challenges. Since then, the applicant has withdrawn two of its challenges. A Labour Relations Officer recently met with the parties to examine the remaining person in dispute. However, the resolution of the status of the remaining person in dispute does not affect the applicant's entitlement to outright certification. The Board will direct the Labour Relations Officer to ascertain from the parties what they wish to do concerning the issue of B. Loder's status on April 18, 1990.

8. The Board is satisfied on the basis of all the evidence before it that more than fifty-five



per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 14, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

9. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in the *bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 4 above in respect of all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

10. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all ironworkers and ironworkers' apprentices in the employ of the respondent in all sectors of the construction industry in the County of Wellington and the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

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**3085-89-U** Gordon Knowles, Joan Lepage, Sue Lamonthe and Don Wade, Complainants, v. United Food and Commercial Workers International Union, Local 175, Respondent v. **Steinberg Inc.**, Intervener

**Duty of Fair Representation - Unfair Labour Practice - Union signed "survival agreement" including agreement to separate bargaining units and collective agreements for future franchised or converted stores - Agreement ratified by union membership - Union later negotiated and signed model agreement for converted stores without seeking consultation or ratification of membership - Complaints alleging union breached representation duty by failing to hold vote - Act specifying manner in which vote to be held but not requiring vote - Union acted reasonably in interpreting original agreement as not requiring ratification of agreements for franchised or converted stores - Requirements of constitution met when original agreement ratified - Complaint dismissed**

**BEFORE:** M. G. Mitchnick, Chair, and Board Members R. W. Pirrie and P. V. Grasso.

**APPEARANCES:** Donald Wade, Gordon Knowles, Joan Lepage, Sue Lamonthe, Muriel Harvey

and *Peter Lapatina* for the complainants; *Harold F. Caley*, *James Crockett*, and *Barry Bailly* for the respondent; *Ann Burke* and *Alain Bilodeau* for the intervener.

**DECISION OF THE BOARD; September 21, 1990**

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging that the respondent Union and its named officers have failed in their duty to represent the complainant employees (stated on the face of the complaint to include “the Membership of Local 175 - Ottawa”) in accordance with the requirements of section 68 of the Act. Section 68 provides:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. While the intervener Steinberg Inc.’s main presence is in the province of Quebec, and the Montreal area in particular, it also operates stores under that name in Ontario. The 11 stores in eastern Ontario (Ottawa, Cornwall and Brockville) are operated as part of the Quebec Division, and have been covered by their own collective agreement with the respondent Union. In October of 1989 the Union entered into a collective agreement with the company to cover potential franchised stores in the area that was less generous in salaries and hours of work than the existing “corporate” stores agreement. That collective agreement was signed without proposals for its terms being elicited from the membership, and without it being referred to the membership for subsequent ratification. It is in these latter respects that the complainants argue that the Union has failed in its duty of fair representation to the membership.

3. The most recent collective agreement for the 11 eastern Ontario stores prior to the events in question was due to expire on September 30th, 1988. In the normal course the Union would of course have compiled a list of employees’ demands and proceeded through negotiations in 1988 to realize as many of them in the renewal of the collective agreement as it could. This particular year did, however, produce a very different round of bargaining. In 1987 the company was expressing public concern over the lack of profitability of its stores both in Ontario and in Quebec. In the eastern Ontario stores alone the loss on operations was reputed to be in the millions, and, as the Union was well aware, the company’s share of the market had declined significantly (primarily to franchised stores of M. Loeb Limited operating under the label of “IGA”). There had, as well, been a widely-publicized falling-out amongst the sisters who owned Steinberg’s, and the press was full of reports of prospective buyers of the company, some of whom were interested only in the “break-up value” or real property of the company, and were expected to close out the stores if successful in their bids.

4. It was against this backdrop that senior members of the company’s management toward the end of 1987 requested a meeting with the Union to discuss the future of the Steinberg’s operation in eastern Ontario - as indeed, the company had already been doing with the Union’s sister Local, Local 500 in Montreal, with respect to the continuation of operations in Quebec. Outlining the company’s financial situation with regard to the supermarkets, the company made it clear that something drastic had to be done to improve profitability if the stores were to remain open. The company then tabled with the Union a multi-pointed proposal for renewal of the collective agreement, the cornerstone of which was a 6-year “labour peace” plan, during which there could be no strikes or lock-outs. Beyond that the company’s “survival” program called for, most notably:

- a dollar an hour wage decrease at the outset, together with an increase in the work week;

- subsequent increases of 50 cents an hour in each of June 1989 and 1990;
- a two-tier wage system allowing for new part-time hires to be paid at lower than the regular job-rates.

Alternatively to the above, the parties could take the matter of wages to an arbitrator, with the arbitrator being instructed to look at conditions of employment in "similar operations". That, the Union recognized, meant that *non*-Union supermarket operations would be included in the comparison as well. Even with those provisions, however, the company insisted that it had to have flexibility in converting non-profitable stores to other types of operations, in particular to the Steinberg's Plus (referred to as "conversion stores") operation carried on by a subsidiary of the company under that name, or alternatively to "franchise" operations carried on by third party franchise-holders. In either case, the company made it plain that what it was looking for was the opportunity to sit down and negotiate lower grades of collective agreements to cover each of those two groups of stores, in accordance with similar collective agreements then being negotiated with Local 500 in Montreal. That latter requirement was set out by the company in the document which it tabled as Article 3A, and read:

3. COMPANY'S BUSINESS PLAN AND SEVERANCE PROGRAM

- A. To fulfill its business mission the Company will pursue its rationalization plan that may include closings, conversions or franchising of existing stores. It is agreed that existing corporate stores affected by conversions or franchis-

ing will be unionized and covered by their own collective agreements, the content of which will be negotiated by the Parties in keeping with similar agreements reached with U.F.C.W., local 500.

The Union took the company's document back to the membership, but in light of the extent of the concessions being sought, urged the membership to reject it. The membership did so, by a majority of 65 per cent. One of the stewards, Gord Knowles, testified that the main point he understood being raised against the agreement by Barry Bailly, the Union's Eastern Region Director, was that this breaking-up of the stores into separate agreements would dilute the Union's bargaining strength. Mr. Bailly does not recall making such a statement, but we are prepared to accept that, in the context of speaking against the whole agreement, that might well have been one of the points Mr. Bailly raised against it. For reasons which will appear later, nothing in this complaint turns on such a statement having been made.

5. The tabling of that first company document took place in May of 1988, and with its rejection the company and the Union went back to the bargaining table. The outcome of those further meetings, attended by the Union officers in consultation with the eight store stewards (serving as an *ad hoc* negotiating committee), was a document presented by the company in July of 1988. That document provided for:

- 5 rather than 6 years of "labour peace";
- no wage cuts or work-week increase.

In addition, a different formula for determining the corporate stores' annual wage increases was provided by way of Final Offer Selection for years one, three, four and five of the agreement, and (of particular significance to the Union) it was agreed for year two of the agreement to adopt whatever increase came to be negotiated in "the industry". Article 3A (the "Business Plan") continued



to be a part of the company's document, (i.e. looking ahead to "conversion" or "franchising" of some or all of the stores under their own yet-to-be-negotiated collective agreements) but with it now went options to bump into other full-time jobs if an employee's own store was converted to a Steinberg's Plus or franchised, or to revert to part-time status in the corporate stores, or to remain with the store under the new owner. In the latter cases provision was made for a relatively generous severance or "buy-out" plan for each affected employee, calling for \$500 per year of service if a "conversion" store, and \$1,000 per year of service if a franchised store. The company indicated to the Union that acceptance of this new proposed agreement would mean that virtually none of the stores (other than those too far gone to save) would be closed, and that the company would cease to entertain any bids from outside interests calling for a break-up or piecemeal sale of the chain.

6. As Mr. Knowles, giving the main evidence on behalf of the complainants, pointed out, this was not the first time the Union had encountered talk of possible store closings from Steinberg's when sitting down to negotiate a renewal of the collective agreement. Apart from the very different level of publicity over the company's business difficulties this time, however, there was a very concrete development in Montreal which, the Board accepts from Mr. Baily's evidence, had a dramatic impact on the Ontario negotiations, and the rising concerns of the membership over their jobs. This was the announcement by the company in June of 1988, at the very time that the continued negotiations on a better company document were taking place, of the closing of 10 of the Montreal area stores. Then-company President Irving Ludmer did not fail to point out to the Union executive in the ongoing Ontario negotiations that 10 stores represented no more than a "spit in the bucket" for the overall Steinberg's operation, and that the company could just as easily make a decision to close out the entire (11-store) area of eastern Ontario, if it did not see real prospects for otherwise putting an end to that drain on the company's resources. In the face of all that was happening, in any event, Mr. Baily, the Eastern Region Director of the Local, and presumably then-President William Hanley, (who, although he did not testify, was involved in the negotiations at that point) concluded that the "July" document tabled by the company as a survival plan was the best that the employees were going to see, and that acceptance of it was necessary if the employees were desirous of preserving their jobs in those stores.

7. The Union thus decided that it was prepared to take that second document back to the membership for acceptance, beginning with a meeting of the stewards. Mr. Knowles testified that at that meeting he spoke against the second document on the basis that it still contained the paragraph (3A) that Mr. Baily had explained would allow the company to dilute the Union's bargaining strength, but says that he was "shouted down" by others in attendance. Mr. Knowles explained that he reluctantly then agreed with the other stewards to recommend acceptance of the document, and a meeting was arranged of the membership for that purpose. Mr. Knowles testified that he and three other (of the eight) stewards subsequently had second thoughts about their decision to support the recommendation. Talking about what they should therefore do at the membership meeting, Mr. Knowles indicated that the four of them considered standing up and declaring their opposition and then walking down from the platform (upon which they would be seated, along with the executive officers of the Union, in presenting the recommendation to the membership). In the end, Mr. Knowles testified however, the four stewards in question elected to take no action whatever; rather, he and the other three stewards decided they would remain seated with the rest of the executive at the front, and simply say nothing (either way). Every employee who attended the meeting was given a copy of the company's proposal (the "July" document), and Mr. Baily went through it point by point. Mr. Baily advised the employees that the company had said there *would* be stores likely converted or franchised at some point during the agreement, but that no timetable had yet been developed for any of that. There was a great deal of ongoing publicity and inter-Local contact over the parallel situation occurring with the Steinberg's stores in Quebec, and Mr. Baily testified

that Ontario employees were well aware of the kind of conversion and franchise collective agreements being worked out with the company to save the stores represented by Local 500 in Montreal. At the end of the meeting a secret-ballot vote was held on the company's proposal for renewal of the eastern Ontario collective agreement, and out of the 400-plus employees in attendance, only 160 voted to reject the document put forward by the company.

8. Toward the end of 1988 the Union elected a new President to replace the retiring Mr. Hanley, and that was former Regional Director for Mid-northern Ontario, Jim Crockett. To Mr. Crockett therefore, as of January 1, 1989, fell the task of completing the implementation of the terms agreed to with Steinberg's in the new collective agreement ratified by the membership in July of that preceding year. In discussing that agreement with Mr. Hanley just before assuming office, one of the first questions that Mr. Crockett had for Mr. Hanley was whether it was contemplated that these further collective agreements covering future conversion or franchise operations, to be negotiated "along the same lines as those being worked out by Local 500 in Montreal", were contemplated by the parties to be submitted once again to the membership for "ratification". Mr. Hanley responded that that was not the understanding, but rather that the membership had been given the opportunity to vote on the terms of the "survival" program in July, and that it was now up to the Union to implement the terms of the ratified agreement. Indeed, as Mr. Baily in his own evidence further elaborated, the company had made it clear in discussing the "Business Plan" from the outset that it had to have the certainty of an agreed-to model collective agreement for franchised stores before it could even *start* the process of canvassing for operators. Mr. Baily noted as well that until a franchise operator was actually found and a store officially transformed to the new status, it could not even be identified which employees would be affected by the "franchise" agreement that the Union was to negotiate.

9. By the time that Mr. Crockett took office in January, the wage increase for the first year of the collective agreement had, according to Mr. Baily and Mr. Crockett, been determined according to industry settlements to be 70 cents across the board, and that increase was to have been put into effect under the "corporate" agreement (which at that point was still being applied to *all* of the stores) as of October 1, 1988. It is also apparent that by that first month of Mr. Crockett's assumption of the presidency, the parties were very close to having come to terms on a collective agreement to cover the Steinberg's Plus stores - that agreement in fact having provisions relating both to the wage schedule and to benefit plans which were, in the Union's view, *improvements* on the agreement negotiated by Local 500. The terms of an acceptable "franchise" agreement, however, continued to be the stumbling-block between the parties. On January 27, 1989, Alain Bilodeau, Steinberg's Group Vice-President, Human Resources and Industrial Relations, accordingly wrote to Mr. Crockett as follows:

WITHOUT PREJUDICE

Dear Mr. Crockett:

Please find enclosed our position on the outstanding issues with regard to the Steinberg Plus contract negotiations. It represents the best Company efforts to resolve this contract in a mutually agreeable way. I wish to stress, however, that these proposals are made in all good faith with a view to arriving at a negotiated settlement, but without any prejudice to our right to apply the agreement reached between us in July 1988, duly recommended by the Union and ratified by a membership vote held on July 11, 1988, in the eventuality that you should not accept the proposals attached herewith.

The Parties are indeed bound by a collective agreement which, among other things, stipulates that:

"the Company will pursue its ration-

alization plan that may include closings, conversions or franchising of existing stores. It is agreed that existing corporate stores affected by conversions or franchising will be unionized and covered by their own collective agreements, the content of which will be negotiated by the Parties in keeping with similar agreements reached with U.F.C.W., local 500.”

This collective agreement also includes a generous voluntary buy-out program with which we have fully conformed at great cost to our company. Last year’s agreement was arrived at in the most trying of circumstances and with a view to help a financially troubled company return to the road of profitability and consequently, prevent the loss of many jobs.

In the particular case of the Ottawa Local, the situation was and still is quite severe and requires that we proceed to make important changes, including conversions and franchising of stores. We have had a very honest and up-front communication on this subject and it is reflected in the deal that was ratified last summer.

After months of delays which were not caused by us, but which cost us dearly, it is now time to resolve all the components of last year’s settlement as we intend to proceed rapidly with implementing the Steinberg Plus’ conditions (store # 06 has now been converted for several weeks) and the franchising of some stores.

In particular, we need to resolve the Steinberg Plus contract and the franchise contract, as well as the wages and benefits for our corporate supermarkets. According to our 1988 collective agreement, we have an obligation to negotiate “in keeping with similar agreements reached with U.F.C.W., Local 500”. I hope you will appreciate that in the case of Steinberg Plus, we have gone over and above that obligation and that you will agree to the enclosed position, so that we can proceed to implement its terms.

With regard to the terms of the franchise contract, I have already given you a proposed document for discussion. The negotiation of such a contract is also a component of last year’s agreement and we need to complete such negotiation promptly as well, just as we need to attempt to resolve the wages for our corporate supermarket employees prior to resorting to arbitration. Every day that passes adds to our financial burden and we are now obliged to act in order to mitigate our losses.

I am available at your earliest convenience and I would appreciate if you could devote all your attention to these matters.

Jim, please understand that this is important to the survival of our business in the Ottawa area, and consequently to your membership as well. I await your reply.

Yours very truly

Four days later Mr. Bilodeau wrote again, stating, in particular:

With regard to the wages in the Steinberg corporate stores, we are prepared to come to an agreement with you within the shortest possible delay. However, as explained in my letter of January 27, it is absolutely imperative that we negotiate a “franchise contract”, since we intend to franchise some of our stores in the Ottawa area, and this is a key element in our dealings with any potential franchisee. You will easily understand that the cost of labour is one major component that a potential franchisee needs to know before committing himself to any franchise agreement with us. Before exercising our right to have a franchisee proceed “in keeping with a similar agreement reached with U.F.C.W., local 500”, we feel that we should negotiate and agree on a “franchise agreement.” The delay in doing so is causing us grave damages, in an area where we are losing large amounts of money.

A draft agreement having been submitted to you, we must now move rapidly. We would not want to do so unilaterally unless you give us absolutely no other choice. At least, this would mitigate our damages. Jim, our Company truly seeks cordial and harmonious relations with all locals of U.F.C.W. You must, however, realize our position must be redressed while treating people humanely. We made a deal which was ratified and consequently, we request that you



gave [sic] effect thereto, failing which we must reserve all our legal recourses in the circumstances.

10. The first Steinberg's Plus store, #6, had in fact been converted in September of 1988, but with no "modified" agreement for such conversion stores yet finally agreed to by the parties, the company was continuing to apply the terms of the original "corporate" agreement to it. By mid-February, however, it appears that all of the terms of the new collective agreement that was to apply to any converted Steinberg's Plus stores had been agreed upon, and the company continued to be anxious that the parties get together and sign the new "conversion" agreement; Mr. Bailly testified, however, that the company had, in the Union's view, pulled back from its commitment to implement the "industry" settlement on 1988 wage rates for the corporate stores, and the Union accordingly declined to meet to finalize the "conversion" agreement. Mr. Bilodeau, as a result, further wrote to Mr. Crockett on April 26th as follows:

Dear Mr. Crockett:

It has now been almost ten (10) months since the agreement regarding our stores in the Ottawa, Cornwall and Brockville areas has been ratified by the membership, which in fact caused our Board of Directors to maintain Steinberg's food operations and put an end to the negotiations to sell its Canadian supermarkets.

In this collective agreement as well as in numerous discussions we have had with your Local since, we have clearly indicated that the Company would proceed to convert or franchise existing corporate stores, that each of these new vehicles would be covered by their own collective agreements, and we have also clearly spelled out the options that would be available to the employees affected by the conversion or franchise of their store.

We have converted store no. # 06 into a Steinberg Plus in September 1988. You were appraised several times of our difficult financial situation in this area. We were to move quickly to resolve between us three components of the 1988 settlement:

1. the wages for corporate store employees;
2. the Steinberg Plus collective agreement;
3. a model agreement that would apply to a franchisee of an ex-corporate store.

After long and what we consider undue delays, we were finally able to agree on the terms of the Steinberg Plus collective agreement on or about February 8th, 1989. Unfortunately, the two other components have not been resolved as yet, due mainly to your extreme reticence to resolve the model "franchise agreement" and despite the fact that I have made myself consistently available to do so in addition to submitting twice to you a complete draft proposal for a model franchise agreement, the whole as appears from my letters of January 27th, February 1st, February 6th, 1989 (all sent by FAX) and April 11th, 1989 (sent by courier).

I gather from our telephone conversations of April 20th, that you are not really interested to meet and resolve the "franchise agreement", and that as far as the corporate store wages are concerned, you may want to use the Final Offer Selection procedure provided for in the collective agreement. With regards to the latter, I cannot object since this is indeed the appropriate procedure to be used according to our collective agreement in the event that the Parties are unable to settle the wages by mutual agreement. We will then expect your application to form a Board of Arbitration and will submit our Final Offer to the Board in due time in conformity with the rules of our Agreement.

With regards to Steinberg Plus and to franchising, we sincerely believe that we have done everything in our power to negotiate in all good faith the relevant agreements, and tolerated a much longer delay than should have been necessary. As mentioned in previous letters, such delay is obviously costing us much and each week that passes adds to the damages we are suffering. We have a business to run and we must now proceed with it, as per our business plan and as spelled out in the collective agreement.

Consequently, and giving effect to the 1988 settlement, we will announce shortly the franchising of a first store in Ottawa. When the official announcement is made, and you will be the first to know, we will communicate properly with the employees affected, introduce the franchisee, and give them all the options which they will be entitled to according to the collective agreement. As to the franchisee, he will be unionized and governed by a collective agreement which terms and conditions will be "in keeping with similar agreements reached with U.F.C.W. Local 500."

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Jim, I think it is unfortunate that the matter has been dragging for so long and that we have to proceed this way, when it should be fairly easy for two parties with experience and with a long lasting relationship to resolve in the light and the spirit of the 1988 settlement. However, I am sure you will understand the urgent need for our Company to move ahead with the plans announced several months ago and to take measures which are very much needed to redress our economic situation in a very competitive market.

Once again, I wish to reiterate my availability and the one of my colleagues at Steinberg Quebec to meet and resolve the matter amicably, if that is of interest to you and at your convenience.

Yours very truly

11. Mr. Crockett's immediate response to that letter was to notify Mr. Bilodeau of his intention to refer the issue of the corporate store wages to arbitration. Mr. Bilodeau responded:

Dear Mr. Crockett:

Thank you for your letter dated April 28, 1989 ....

I take good note of your desire to submit the question of wages to arbitration in accordance with the terms of our 1988 agreement.

As to your invitation to meet, I would be pleased to do so, provided however that we may discuss not only the opportunity to implement whatever wages we agree upon for our corporate stores, but also the working conditions to apply to a franchise operation. We would indeed like to put all the 1988 agreement into effect and not only part thereof, as explained in several previous letters. If you wish to do this, I am available at your convenience within the suggested time frame.

However, if you are proposing to meet solely to have us agree to implement the increases which *you* propose, but not to resolve the other components of the 1988 agreement, let me say that it is probably a better idea to go to arbitration on wages. In that regard, I will be more than happy to accommodate you and we will act promptly to appoint our representative to the Tribunal and submit our position on wages to you and the Board in due course.

Please keep in mind that you will shortly be required to comment on the franchise agreement, in any event, as we are obliged to proceed with the implementation of the 1988 agreement. Our losses in the Ottawa area and our legal rights under the 1988 agreement do not permit further delays.

I shall await your prompt reply.

Yours very truly

Mr. Crockett on May 9th wrote as follows:

Dear Mr. Bilodeau:

Further to your letter of April 26, it appears to me that there is some confusion regarding your facts of the Steinberg Plus Agreement and the Franchise Agreement.

In my opinion, there were no long undue delays in reaching a tentative settlement with the Steinberg Plus Agreement. I was first involved in early December with that agreement and we were able to reach a tentative agreement on February 8, 1989. This agreement would have been taken to the membership for ratification if you had agreed to implement the Ontario wage settlement in the Ottawa region, as you had indicated you would.

If you wish to go ahead and implement the Steinberg Plus Agreement, in any of the existing stores, that will be your choice. We, in turn, would take the position that the existing contract would stay in effect until such time as a new agreement had been ratified by the members affected.

Regarding the Franchise Agreement, I indicated to you at our last meeting that we could fine tune the tentative Steinberg Plus Agreement as the new Franchise Agreement.

I asked that you separate from the Steinberg Plus Agreement the articles that would be acceptable to you and have them sent to Barry Baily. We could then meet and discuss the other articles you felt needed change.

After approximately seven weeks, I contacted you to find out what you had done with regard to the Franchise Agreement. You apologized for the delay and within a week I received a complete Franchise Agreement from you rather than the document I had asked for.

If there has been any delay in these negotiations, I'm afraid I cannot shoulder the blame.

Should you wish to continue to attempt to negotiate the Franchise Agreement, I would be more than willing to do so but under the original terms.

Meanwhile, should you decide to franchise a store, please contact me first. I would expect that the existing collective agreement for the store would stay in effect until such time as an agreement is reached between the parties.

With regard to the wage rates, we have already applied for final offer selection and have submitted our representative to the tribunal and would expect you to do the same without undue delay.

The enclosure that we refer to on page 2 was the existing collective agreement. I did not believe you needed a copy of the collective agreement.

I understand that a Franchise Agreement was signed on March 31, 1989 with Local 500 covering Steinbergs stores in Montreal. Would it be possible to have a copy of the agreement in English.

Yours very truly,

That prompted a further letter from Mr. Bilodeau on May 10th, which read, in its material parts:

... We feel that between July 1988 and April 1989, there should have been ample time to resolve all the components resulting from the 1988 settlement and the failure to do so was certainly not attributable to our lack of trying and pushing relentlessly for months and months. In fact, our Company is the one that suffers the damages and this is why we must now finally proceed as explained in my letter of April 26.

On the question of "ratification", we feel that there is no need for any ratification since the 1988 settlement is clear and was duly ratified on July 11, 1988 by the membership. In fact, any change of heart by the membership would most certainly result in grave damages and considerable litigation.

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Regarding the conversions of stores into Steinberg Plus (ex. store no. # 06), or to a franchised status, please note that once the employees will have been given their options according to the collective agreement and/or the franchisee will have taken possession of the store as the case



may be, the working conditions to apply from day one will certainly not be those applying to corporate stores but rather:

1. the terms already agreed upon for Steinberg Plus;
2. a model franchise agreement "in keeping with U.F.C.W. Local 500", as adjusted for Ontario, or as otherwise agreed upon between the parties. To that effect, I think it would be worthwhile for you and me to try to meet again one more time to resolve the matter. Should you agree, please call.

12. By this time the parties clearly were becoming exasperated with each other, and in July the company filed an unfair labour practice charge against the Union, alleging that it was refusing to bargain in good faith on the follow-through of the July '88 agreement, and that agreements ultimately negotiated by Local 500 for both conversion and franchise stores in Montreal had been forwarded to the Union for its action. The company at the same time persisted in its position that it was costing it too much money to wait for the Union any longer, and would have to implement the comparable agreements in eastern Ontario unilaterally. The Union responded to all of this by filing an unfair labour practice charge of its own against the company in August, making it clear that it felt the company had no lawful right whatever to put into effect new collective agreements for the conversion or franchise stores without those agreements having been negotiated with the Union.

13. Finally, after some further skirmishing and exchanges of proposals, an agreement for the prospective franchise stores was arrived at, and Mr. Bilodeau wrote to Mr. Baily evidencing that. At the same time the company agreed to implement the two-year wage increases (the second-year increase had by this time been determined by industry negotiations as well) for the corporate stores, and the letter from Mr. Bilodeau dated September 11, 1989 provided as follows:

Dear Mr. Baily:

Following our recent agreement in principle and as requested, please find enclosed for your review and approval two (2) copies of the Steinberg Plus collective agreement in force from May 8, 1989 to May 7, 1991, and two copies of the model franchise agreement to apply to each corporate store that may be franchised in eastern Ontario in the future.

With regard to the Corporate stores Agreement and as per our discussion, I am confirming that the wage increase will be .70¢ the first year (October 1, 1988 to September 30, 1989) and .55¢ the second year (October 1, 1989 to September 30, 1990). The .70¢ increase will be retroactive to October 1, 1988 for all employees still employed in our corporate stores as of the date of payment. For employees working at Steinberg Plus, it will be paid for hours worked between October 1, 1988 to May 6, 1989. Payments will be made only after the three (3) above collective agreements will have been duly signed.

Would you kindly confirm to me that all documents are in order, so that we can arrange a signing date in Ottawa in the nearest future.

I thank you for your cooperation and remain,

Yours very truly

14. At that point the Union received notice from the company of its plans to franchise the first of the eastern Ontario stores, being Store #91, and the Union, consistent in fact with statements that had been made in its membership newsletter (and the action it had taken with respect to the Steinberg's Plus agreement when the first of *those* stores was actually ready for conversion), on October 10th posted notice of a "ratification" meeting for the employees of Store 91. The notice read:

WE HAVE COME TO A TENTATIVE AGREEMENT WITH THE COMPANY REGARD-

ING A FRANCHISE AGREEMENT. THE PURPOSE OF THIS MEETING IS TO DISCUSS THIS AGREEMENT AND CONDUCT A SECRET BALLOT VOTE FOR RATIFICATION.

PLEASE BE SURE TO ATTEND THIS VERY IMPORTANT MEETING!

The company subsequently advised the Union, however, that the franchising of that store was not being proceeded with, and the Union cancelled the meeting with the following notice of October 11th:

DUE TO THE FACT THAT THE COMPANY HAS PUT OFF FRANCHISING STORE 91 INDEFINITELY, THE EXECUTIVE BOARD OF YOUR UNION HAVE DECIDED TO PUT OFF RATIFICATION OF THE FRANCHISE AGREEMENT UNTIL SUCH TIME AS THERE IS A DEFINITE DATE FROM THE COMPANY AS TO WHEN THE STORE WILL BE FRANCHISED.

*THERE WILL BE NO MEETING ON OCTOBER 22ND.*

On October 23, 1989, the company and Union met together and formally executed both the model Steinberg's Plus agreement and the model franchise agreement. It is not clear from the evidence exactly what occurred between those two dates, but the evidence is that there was at least a telephone call from Mr. Knowles to Mr. Baily, complaining that as no stores had yet in *fact* been franchised, *all* corporate employees should have been invited to the meeting to vote on the franchise agreement. It may have been at that point that Mr. Crockett through Mr. Baily first began to get an inkling that the "franchise agreement" might be in trouble.

15. In any event, in February or early March of 1990 the company advised the Union that it was once again ready to proceed with the franchising of a store, as of the 21st of March, and Mr. Crockett instructed Mr. Baily to make arrangements for a meeting hall so that the employees of the store could be advised of the terms of the new "franchise" agreement. That was not, however, to be a "ratification" meeting, in terms of the employees' acceptance or rejection of the newly-negotiated "franchise" agreement. As noted, Mr. Crockett had talked to both Mr. Hanley and Mr. Baily previously (as well as legal counsel), and knew that their understanding of the 1988 renewal agreement was the same as the company's: i.e., that the model collective agreements for conversion and franchise stores, the content of which was to be "in keeping with similar agreements reached with U.F.C.W. Local 500", were not subject, following the July vote, to further "ratification" by the employees. Notwithstanding that, however, the Union from the outset of negotiations on the conversion and franchise agreements had taken the position with the company that in its view both of those agreements *did* have to be submitted to the membership for approval. Mr. Crockett explained in his evidence, as did Mr. Baily, that the Union's reasons for doing that were twofold: one, such a posture gave the Union somewhat more leverage with the company in trying to squeeze out of the negotiations the best deal possible; and two, as Mr. Crockett put it in his testimony, it is always better to get an agreement ratified by the employees when you can, because "it makes life easier for everyone". That, he explained, is the reason why the "conversion" agreement was taken to the membership and voted on (the Union at that point knew there would be no difficulty persuading the membership to vote in favour of that agreement), and the same went for the Union's thinking early in October of 1989, when the first of the company's stores was supposedly on the way to being franchised.

16. At some point subsequent to that, however, it had become clear to Mr. Crockett and Mr. Baily that the "mood" in the stores had changed. No stores had been closed, and some employees, apparently believing from the size of the then-in-

place wage increases that the Union had been successful in achieving for the corporate stores that

the company must be better off than it had been saying, seemed, in Mr. Crockett's words, to be experiencing a "change of heart" about the July deal. Word of the Union having already signed the model franchise agreement in October had in fact come to the employees by February of 1990, and a number of them had immediately "petitioned" Mr. Crockett for a meeting to explain what was going on. Mr. Crockett readily admitted before the Board that he himself had, over the course of those several months, changed his mind about the advisability of putting the model "franchise" agreement to the employees for a vote, and articulated in detail the thought process he had gone through. The prospect of the franchise agreement being voted down by the employees who would turn out for the meeting had, Mr. Crockett explained to begin with, become a real one, and he had to think through what it would mean to the employees if that were allowed to happen. Under the overall agreement arrived at and ratified in July of 1988, he recognized, many of the employees, whether leaving or staying with a converted or franchised store, had already been in receipt of the severance payment that was part of that deal. And in doing so, all had been required to sign the company's standard form of release before the company was prepared to make those payments (which well exceeded the minimum payments provided for under the *Employment Standards Act* of Ontario). In the case of Mr. Knowles, for example, the release provided:

STEINBERG INC.

RELEASE

It is agreed that the signing of this release entitles me to the following separation pay:

Separation pay amount (\$16,000)

I request that this amount be paid to a Retirement Registered Savings Plan (as per applicable fiscal regulations) based on completed TD2 forms.

In addition, I will be entitled to the vacation pay owed at the time of departure. This amount will be paid directly to me and it cannot be transferred to an R.R.S.P. Plan. [Plus sick leave owed]

I agree that such payment will constitute the final and total settlement of all lawsuits, claims and petitions of any nature whatsoever that I have or could have against Steinberg Inc., its directors or officers as a result of my employment with Steinberg Inc. and of its termination thereof as of 14-4-90 and I give release accordingly.

I hereby authorize the employer to recover from such amount any sum owed to Steinberg Inc. (including WCB advances).

As of the final day of evidence in these proceedings, in fact, employees in the 5 stores that had by then been franchised had been paid severance pay by the Company in excess of a million and a half dollars, again pursuant to the "July deal" of which the "conversion" and "franchise" agreements formed a part.

17. More compellingly, however, Mr. Crockett testified, he had to consider what was likely to happen if he went back to the company and told them the franchise agreement was rejected by the employees and that he wanted to negotiate a better one. Mr. Crockett was of the view that the company was highly unlikely to look favourably upon that suggestion. So where, he wondered, would that leave the employees? By the July '88 agreement, they had foregone the right to strike for five years. Thus the only way to obtain a "better" agreement was for the Union to take its chances at arbitration. Mr. Crockett was, however, anxious to retain for the employees the improved conversion and franchise agreements the Ontario Local had negotiated for its members over those of Local 500, and at arbitration he felt the company would have a very strong case against the Union based on the collective agreements that Local 500 in similar circumstances had



in fact agreed to; thus, Mr. Crockett concluded, his own members would more likely than not do *worse* at arbitration than had been obtained by the Union through its direct negotiations. Weighing all of the considerations, as Mr. Crockett stated, "I had a judgment to make, and I made it", deciding in what he believed to be the best interests of his members to follow through with the franchise agreement as negotiated, and simply "take the heat" at any meeting with the employees.

18. And take the heat he did. There were 147 employees in attendance at the March 18th meeting (out of a membership potential of 1000), and the mood was decidedly hostile. The meeting lasted some 2 to 2-1/2 hours, during which Mr. Crockett reviewed the terms of the July '88 collective agreement that the employees had ratified. He explained as best he could the obligations on the Union that he believed had arisen out of that, as well as the unfair labour practice charge that the company had filed against the Union over the conversion and franchise agreements. Mr. Crockett testified, however, that the employees remained antagonistic throughout the meeting, and that it was clear that the only thing that was going to satisfy them would have been for him to tear up the franchise agreement at the conclusion of the meeting. Mr. Crockett was not prepared to do so.

19. The argument of the complainants, presented by Mr. Wade, was well articulated and straightforward. Under the agreement approved by the membership in July of 1988, he notes, the collective agreements to cover future franchise operations were left to be "negotiated by the parties", and that, in the complainants' view, means not simply the company and the Union (as those two parties have purported to interpret it), but rather the individual franchise owner and the membership at each store. Mr. Wade submits that that is underscored by the fact that both Mr. Baily and Mr. Crockett agreed with him in cross-examination that the "Union" is "the membership". Yet, he submits the Union decided to arbitrarily effect *substantial* changes in the corporate store contract, as it would be applied to any franchised store operations, without membership input, without the appointment of a negotiating committee, and without ratification by the members - all contrary to the Union's practice in negotiating collective agreements with the company in the past, and indeed, contrary to the Union's own Constitution. In that latter regard Mr. Wade points to Article 23 of the International's Constitution, which provides in specific terms as follows:

(D) 1. The affected membership may submit initial proposals for a collective bargaining contract or renewal of such a contract to the President of the Local Union involved or to a representative or committee designated by such President prior to the commencement of negotiations. Initial proposals shall be referred to the affected membership or a committee of the affected membership for approval, as directed by the President of the Local Union.

2. Following the approval of such initial proposals by the affected membership or a committee of the affected membership, the President of the Local Union involved or his or her designated representative or committee shall meet with the employer and endeavor to arrive at an agreement. The current status of such meetings with the employer shall be reported as regularly as practical to the affected members.

3. The proposal judged by the President or negotiating committee to be the employer's final proposal for a collective bargaining contract or renewal of an existing contract shall be submitted to the affected membership for its consideration. A majority vote of those present and voting shall be necessary to accept or reject the proposal.

The Union's manner of dealing with the franchise agreement, Mr. Wade notes further, can be contrasted with the Union's action regarding the Steinberg's Plus agreement, where the members in the individual store converted *were* given the opportunity to accept or reject the agreement. Indeed, Mr. Wade points out, the latter is exactly the way the Union, in its own newsletter as well as other statements, advised the membership that the franchise agreement, once concluded with the company, *would* be dealt with. The Union in fact had made arrangements to do just that on

October 22nd, 1989, with respect to Store 91 that initially was going to be franchised at that time, but pulled back - only to sign the agreement with the company on October 23rd, without any word to the membership, until the membership found out for themselves through conversations with the Store Managers the following February. Mr. Wade asserts that the company has been threatening the membership with store closures for the past ten years, and that rather than accede to such arguments this time, the Union should have pursued its rights to take the company to Court [or arbitration]. Mr. Wade submits that no credit should be given to the Union for negotiating a severance plan, since the employees were in fact being terminated by Steinberg's, and were doing no more than complying with their obligations under the law. Also under the law, being section 72(5) of the *Labour Relations Act*, Mr. Wade adds, the Union had an obligation to put the terms of the new franchise agreement to the membership for ratification. Mr. Crockett testified that he had a judgement to make and that he made it in what he felt was the best interests of the members; but, says Mr. Wade, if Mr. Crockett really wanted to act in the best interests of the members, he should have adhered to the provisions for negotiating and obtaining the approval of collective agreements set down in the Union's Constitution. To do otherwise, and have acted in the arbitrary and secretive way in which the Union did, concludes Mr. Wade, was a betrayal of the membership, and a denial of its right to self-determination under the *Labour Relations Act* and the Union's own Constitution. Based on all of this, Mr. Wade asks on behalf of the complainants that the "model" franchise agreement executed by the company and the Union on its own be dissolved, and that the full terms of the "corporate" stores agreement be found to have continued to apply to such franchised stores (and the members compensated retroactively on that basis) until a new agreement for such stores is properly negotiated. And the "proper" way, the complainants say, of negotiating such agreements is for each store to have its "own" collective agreement, as they say is called for by Article 3A of the 1988 July agreement, worked out between the individual store operator on the one hand, and the Union and its members in that store on the other.

20. In assessing this matter it is important to note to begin with that neither section 72(5), nor any other section of the *Labour Relations Act*, makes it a *requirement* that a Union hold a ratification vote prior to making a decision to accept and enter into a collective agreement with an employer. That specific section of the Act provides, together with its adjacent sections:

72.-(4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that a person expressing his choice cannot be identified with the choice expressed.

(5) All employees in a bargaining unit, whether or not such employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

(6) Any vote mentioned in subsection (4) shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

About these sections the Board in, for example, *K-Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421 observed:

15. It might be noted at this point that the *Labour Relations Act* does not specifically require that a trade union conduct a ratification vote. Had the union simply signed the agreement, there might well have been no basis for the present complaint.

...

In that case the Union was having a difficult time negotiating a "first" agreement with the company, with both sides apparently being fully aware that many of the employees in the newly-certified bargaining unit simply had no appetite for enforcing the demands of the Union by engaging in

a strike which the company seemed likely to "win". A proposal for a complete three-year agreement had been put forward by the company in September of 1980 and, at the urging of the Union, rejected by the members of the bargaining unit by a vote of 29-0. Nevertheless, the Union, after further unsuccessful attempts to wring concessions from the employer, concluded that that offer of the company was the best one it was going to see, and at a meeting of the membership in December, finally recommended its acceptance. The employees at the meeting, many of whom were openly opposed to the Union continuing to represent them, voted against the offer by a narrow margin of 18-17. The Union considered the result of the vote, but nonetheless proceeded to accept and enter into the collective agreement on the terms proposed by the company. A number of disgruntled employees in the bargaining unit sought to have the agreement set aside by alleging a violation of the "duty of fair representation", section 68 again, of the *Labour Relations Act*.

21. The Board reviewed the rationale put forward by the Union in deciding to act as it had as follows:

20. All of the members of the bargaining committee acknowledged that the agreement was not a good one - in fact, it differed very little from the package which had been put before the employees on previous occasions. Now, however, the members of the bargaining committee, and the union officials urged acceptance. While the agreement left much to be desired, there were certain non-monetary benefits, and the union would be established. It could solidify its position, and seek improvements in the next round of negotiations.

...

23. ... Serious consideration was given to abandoning the bargaining rights, but this would necessarily mean abandoning its members - some of whom had remained committed to the union throughout the 1976 strike and had actively assisted in the 1979 campaign....

The Board then noted, following upon its earlier comments on the effect of section 72 of the Act, that the question of whether or not the Union decides to hold a ratification or strike vote is, under the law of this province, "left to the union to be determined in accordance with its constitution and/or its own appraisal of the tactics of the situation". After referring to the *Diamond Z* case, [1975] OLRB Rep. Oct. 791, to which we will return, the Board at paragraph 35 stated its conclusions as follows:

... There is no doubt that the union carefully considered the options open to it, and weighed all of the circumstances including the collective bargaining reality of the situation, the terms of its constitution, and the motivation of its opponents. There was no "bad faith" in the sense of personal animus against the employees in the unit. Indeed we were impressed by the sincerity of the respondent's witnesses and their obvious concern as they grappled with a difficult decision.

The complaint against the Union was accordingly dismissed.

22. A similar result was reached by the Board subsequently in the case of *T. Eaton Company Limited*, [1985] OLRB Rep. Aug. 1309. Indeed, the facts there in many ways provide more of a parallel to our own. Although on strike for a first collective agreement, the Union was in the difficult position of trying to negotiate a collective agreement for only six of the many stores of the retail giant, and accordingly, as in *K-Mart*, both sides once again were sharply aware of the limitations on the Union's bargaining power. And once again there was as well a significant faction amongst the employees bent on terminating the Union's bargaining rights, in this case the lines being even more sharply drawn between those employees committed to supporting the strike in the hope of gaining a Union foothold, and those employees crossing the picket-line and going to work. The Union was running out of time in consummating a collective agreement before the six-month limitation period for protecting their members' absolute right to return to their jobs would expire



under the Act, and its opponents in the circumstances attempted to take the tactical initiative by submitting to the Union a petition “that a ratification vote be held on any proposal before it is accepted by the union as a collective agreement”. The Union nonetheless proceeded to enter into a collective agreement with the Company without referring the matter to the employees making up the store bargaining units. The dissident employees responded by seeking to have the agreement set aside by the Labour Board under the provisions of section 68 of the Act.

23. The Board in considering the matter noted that, although the *Act* did not make mandatory the holding of a ratification vote, the Union in the case before it nevertheless acknowledged that it was its practice, almost without exception, to do so. In addition, it was agreed by the parties that:

“During the (organizing) campaigns, union organizers from time to time in explaining the bargaining process to prospective members included in their remarks references to ratification votes.”

The Board observed that the Union subsequently, however, in deciding *not* to submit the employer’s offer to a ratification vote, was concerned over the express possibility that a majority made up of non-striking employees might vote it down, and that the “petition” calling for the holding of such a vote prior to any collective agreement being entered into was one of the factors that led the Union’s officers to conclude that ratification votes in the various bargaining units affected would not be appropriate in this case.

24. The Board nevertheless concluded that the Union was entitled under the law to proceed with the course of action that it did. In reaching that conclusion the Board explained its thinking as follows:

26. The complainants contend that the union acted in bad faith, and thereby violated section 68, by denying employees an opportunity to participate in a ratification vote after advising employees during its organizing campaign and at the time of the strike vote that a ratification vote would be held. As noted above, although the parties agreed that the union did not actually promise employees that a ratification vote would be held, nevertheless, union officials when describing what they understood would happen indicated orally and in writing that a ratification vote would be held. It is not disputed that these comments were made in the good faith belief that ratification votes would be held. The only issue is whether the subsequent decision not to hold ratification votes demonstrated bad faith on the part of the union.

27. At the time that the union decided upon the method by which it would ratify the proposed collective agreements it was in a most unenviable situation. It was the view of Mr. Collins, who had responsibility for coordinating negotiations on behalf of the union, that the company was not likely to make a better offer unless the strike and associated consumer boycott continued for an extended period of time. However, striking employees faced the real possibility that they might lose their jobs if the strike continued much longer. Although at the time the striking employees had not yet been asked if they desired to return to work, from Mr. Collins’ evidence it is clear that he suspected that many of them did not wish the strike to continue. In addition, unless collective agreements were entered into fairly quickly it was quite possible that employees who did not support the union might file termination applications. On top of all of this, the union was concerned that if it held ratification votes, non-striking employees might vote down the proposed agreements and put the union in a situation where it had no agreements and no chance of getting any. The *Labour Relations Act* contemplates that the result of collective bargaining will be a collective agreement. The purpose of a ratification vote is to allow employees to indicate whether certain proposed terms for a collective agreement are acceptable to them as opposed to possible other terms. The union felt that if ratification votes were held in this case, and the proposed agreements defeated, its bargaining rights would be effectively destroyed. The Act, however, stipulates that votes to terminate a union’s bargaining rights are to be conducted in response to proper and timely termination applications. They are not to be conducted in the guise of ratification votes. Given these considerations, we do not believe that the union acted in

bad faith when it decided not to follow the normal ratification procedures that had previously been described to employees. The reality of the matter was that this was not a normal situation.

25. More broadly, the Board in discussing its limited supervisory role under section 68 of the *Labour Relations Act* has had this to say, for example, in the *Diamond Z* case, at paragraphs 13-14:

13. ... There is no dispute that the duty of fair representation owed employees in a bargaining unit is just as relevant during the negotiation of a collective agreement as during its term of operation once concluded. It is also without dispute that the pivotal period anticipated in the collective bargaining process is the conclusion by the parties of a collective agreement. The supervisory jurisdiction of the Board as expressed in the Act in connection with the conduct of both union and employer during negotiations is restricted to the requirement that the parties "shall bargain in good faith and make every reasonable effort to make a collective agreement". Save for this mandatory requirement the Board in applying a standard owing employees in the bargaining unit during the negotiating process is conscious that it must not interfere with the wide discretion conferred the employees' "exclusive bargaining agent" to reach a settlement. The Board is cognizant, especially during the negotiation of a first agreement that the period preceding the making of a collective agreement is often when employees' hopes for improved terms and conditions of employment are at their height. Indeed the trade union may have induced these expectations by representations made during the course of an organizational campaign or at the twilight of an agreement about to expire. The realities of the negotiating process however may often result in some measure of employee disappointment with respect to the ultimate settlement. The synthesis contemplated in the bargaining process where the initial positions of the parties are subjected "to the give and take" of compromise and concession is bound to cause some measure of alteration in those positions. In this context the trade union representative must be at his most adroit. He must convince the rank and file that the sacrifice of long term benefits for immediate gains is desirable having regard to the particular circumstances. The employees must be convinced that the benefits not included in a settlement are merely deferred benefits until the onset of the next bargaining sessions. In the same context the employer's strategy of containing the more excessive demands of the trade union may have resulted in the avoidance of a work stoppage by virtue of acceding to the minimal requirements that constitute in the circumstances a fair settlement. Achieving this mutual accommodation requires the unfettered discretion of the representatives of the parties to explore all avenues of accommodation without the intervention of this Board in setting standards of conduct that may be characterized as an unwarranted intrusion in their private affairs. We are of the view that the representative trade union despite its obligation to employees in complying with the duty of fair representation must necessarily have "a free hand" in setting strategies that will best forward employees' interests irrespective of their expectations. (See: *The Nicholas E. Erderly* case OLRB M.R. September 1972 844).

14. What then ought to be the minimum expectation of employees with respect to their union's compliance with the duty of fair representation during the negotiating process? We do not intend by raising this question to prescribe a standard of conduct that could be construed to interfere with the internal procedures of trade union. A Union may have adopted its own procedures, whether governed by regulations contained in its constitution or by past practice, for communicating business matters to its constituents. Some trade unions as a matter of general practice will seek the approval of the rank and file prior to concluding a formal collective agreement; whereas, other unions may be authorized by their principals to enter into an agreement without prior consultation. Of those trade unions that do refer tentative settlements to the rank and file some may require the recommendation of their representatives; others may not. In other words the practice that is adopted by a trade union in negotiating process is not intended to be assessed in determining whether a breach of the duty of fair representation has occurred. Matters pertaining to that issue ought to be resolved privately by the parties having regard to their particular needs. (See; *The Arthur Joseph Roberts* case OLRB M.R. March 1974 169 at p. 172; *The General Impact Extrusions* case OLRB M.R. August 1972 798; *The Canadian Textile and Chemical* case OLRB M.R. August 1971 469 at p. 470 for Board expression of its concern in interfering in internal union affairs). What the Board is concerned about in measuring the conduct of union representatives during the negotiating process is whether the employees affected have been treated honestly and in good faith. The adequacy of the settlement and the formal



processes adopted in order to arrive at an accommodation are not necessarily in issue. What is in issue is whether the trade union by its conduct has acted fairly in the interest of employees in dealing with the employer with respect to their terms and conditions of employment.

26. Clearly, the situation facing the Union in the case before us here was not, to use the words in the *T. Eaton Company* case, “a normal situation” either. We recognize that the employer here may well have, in the past, made reference in negotiations to the economics of the company’s situation, and the prospect of closures of some or all of the stores if a “satisfactory” collective agreement were not able to be worked out. In the lead-up to the 1988 round of bargaining, however, there were in fact elements confronting the Union which understandably might have had an impact on the seriousness with which it regarded the statements of the company. Focus on the question of the company’s viability or willingness to remain in the supermarket business was receiving unprecedented attention, and the rift between the sister-owners of the company had made sale and closure of the stores an active possibility. Even in the face of that, however, it is apparent that Local 175 was not prepared to give the company a “free ride”, and made a strong recommendation to the membership that the proposal originally put together by the company in March be turned down. By June, however, there came a development that, in terms of the seriousness of what the company had been saying to the Union and its members, could not be ignored, and that was the chilling announcement that the company was closing 10 of its stores in the Montreal area. That is virtually the size of the whole eastern Ontario group of stores, and that announcement, as Mr. Baily noted, had “serious repercussions” on the thinking of those involved in the Ontario stores at the time.

27. That was the backdrop for the July proposal taken back to the membership, and while the Union at that point decided to recommend it for ratification, it should also be noted that that package was substantially better than the one the company had been disposed to table in March. Certainly for the stores which remained within the corporate chain the terms of that renewal agreement were *far* less concessionary, and indeed, as it turned out, there was relatively little activity of a “conversion” nature, and certainly of a “franchising” nature, prior to the last six months of the initial two-year collective agreement. In addition, there was a clear recognition that employees who ultimately did come to have their store converted or franchised were in fact being “terminated” as employees of the parent company, Steinberg Inc., and generous severance allowances, in excess of those required by the *Employment Standards Act*, were provided for as a result. But the *quid pro quo* still demanded by the company in return for all of that was a recognition that if the stores ultimately were going to be able to continue to operate on a “viable” basis, they had to be allowed to do so under collective agreements, first for “Steinberg’s Plus” stores, and then for franchised stores, that were less expensive than the collective agreement theretofore applying to the corporate stores. And that was the deal ratified by the employees, with the question of their own job survival in the stores squarely before them, at the meeting convened with the full membership in July. By then, as we are told, fully half the stewards, including Mr. Knowles, had had second thoughts about the wisdom of the deal, but elected to maintain their place at the front of the hall, and to say nothing, rather than place themselves in the position of encouraging the employee group to adopt the risk of rejecting the company’s proposal. The ratification vote thus proceeded, and the employees by a wide margin gave their approval to what was to be the “blueprint” for the maintenance of the supermarket chain in eastern Ontario into the future. And there was no secret that an integral part of that blueprint was the future “negotiation” of separate collective agreements for both the conversion and franchised operations: explicit reference was made to that in Article 3A of the document that was handed out to each employee at the July 1988 meeting, the content of such collective agreements to be

“in keeping with similar agreements reached with U.F.C.W., local 500”.



The ratified document, in other words, on its face locked the Union and its members into acceptance of collective agreements for the conversion and franchise agreements that would be essentially no better than those that came to be negotiated by Local 500 in Montreal (just as they were locked into accepting the result of an arbitrator's award, if necessary, for the setting of wages for the *corporate* stores). The decision to "ride the coat-tails" of Local 500 appeared, Mr. Crockett testified, to be a sensible approach at the time, because that was by far the bigger Local with respect to the representation of Steinberg's stores, and the one therefore likely to have the most clout with the employer. In the end, as it turned out, Local 175 managed to hold out for terms in some respects even *better* than those agreed to by Local 500. But that is not the significant point. The significant point is that the employees, after having the opportunity to ask any questions they chose about the July document, including the reference to subsequent collective agreements "in keeping with similar agreements reached with U.F.C.W. Local 500", overwhelmingly decided that it was in their own interest to ratify it, and did so.

28. On the basis of that ratification the company then proceeded with its "rationalization" plan, including the payment of the agreed-upon severance allowances where applicable. And the Union also proceeded, however haltingly, to consider the question of the conversion and franchise agreements, in conjunction with the developments taking place in that regard with Local 500 in Montreal. It is clear that the Union at that stage had it in mind to put the finished product before the membership for acceptance (as it had begun to do before the plans to franchise Store 91 were cancelled) simply on the basis that, as subsequent events have so aptly proven, "it makes life easier for everyone", and especially the Union's leadership. But by the time the company had a store actually ready for franchising, the Union officers had discerned a momentum against such concessions, and were thus placed in a position where they had to make a difficult choice. Having considered all of the options, and what the various ones would likely mean for his membership, President Crockett came to the conclusion that it was simply too late in the process, in light of the renewal agreement ratified by the employees in July of 1988, for employees to change their mind, and he decided not to adopt the course of putting the model franchise agreement before store employees for a further vote.

29. That decision was taken by Mr. Crockett, once again, on the basis of a belief that that July 1988 renewal collective agreement permitted him to do that. That certainly was the company's view at the time of the July negotiations (as repeatedly evidenced in their position subsequently). We should make it clear, however, that it is not the role of the Board in the section 68 proceeding before us to purport to interpret that collective agreement. The only question we have to ask ourselves is whether the interpretation put on that agreement by the Union, and specifically Mr. Crockett, was a "reasonable" one, insofar as that helps the Board to decide whether the belief he says he held was in fact held by him, honestly and in good faith. And we believe that it was. The whole context of the unusual negotiations that were going on in July of 1988 makes it entirely reasonable to conclude that what was being authorized by the employees was not simply a further negotiating process the product of which would once again be put before the membership for its approval or rejection. Steinberg's at that point was making the decision whether to continue with the operation of its supermarkets, and to pull away from all ongoing negotiations for the sale of its store assets piecemeal (they subsequently *were* sold, but as a group), and proceeding rather with its plans to transfer the operation of stores within the area to Plus or franchised operations. Indeed, as Mr. Bailly noted, it was recognized that it would not even be possible to solicit and negotiate deals for the assumption of a franchise on any store without being able to lay out for a prospective operator what the specific terms of the applicable collective agreement would be - at least at the outset. We say at the outset because we note that after the term of that initial collective agreement, the terms of any subsequent collective agreement are, under the July agreement, left to be worked out between the individual franchise operator and the individual store bargaining unit - as the com-

plainants in their remedy are seeking. In the face of all of that, we do not, as we have said, find it unreasonable, or unworthy of belief, that the Union would have taken the company in the July document not to have left the ultimate disposition of the franchise or conversion collective agreements to the unfettered whim of further employee ratification. Rather, we are satisfied that the Union's officers honestly and reasonably believed that the July document specifically authorized them to proceed on their own (if they chose) to enter into collective agreements for conversion and franchise stores that were "in keeping with similar agreements reached with U.F.C.W., local 500" (and there is no allegation that the agreements ultimately entered into by Local 175 were not).

30. That is the only determination that the Board has to make under section 68 of the Act, and the provisions of the Union Constitution before us in this matter do not change that. As the Board has stated on numerous occasions, the Board has, once again, only a limited role to play with respect to the interpretation or enforcement of a Union's constitution. See, for example: *Gold Crest Products Ltd.*, [1973] OLRB Rep. Aug. 436; *Labourers, L527 and Frank Manoni, Lise Manoni*, [1981] OLRB Rep. Dec. 1775; *Auto Workers, L525 and Sylvia Colalillo*, [1982] OLRB Rep. July 1066; *Labourers, L1089, Rocco D'Andrea and Luciano D'Alessandro and Donato Marinaro*, [1987] OLRB Rep. July 986; *Sutherland, Keith MacLeod*, [1983] OLRB Rep. July 1219; *Labourers, L527 and Nello Scipioni, Bernardino Carrozzi and Frank Manoni*, [1983] OLRB Rep. Aug. 1344; *Plasterers, L598 and Angelo Moro*, [1983] OLRB Rep. Aug. 1354 and *Intl. Operating Engineers, L793 and Ronald Lewszoniuk*, [1984] OLRB Rep. Jan. 48. The only relevance of the Constitution for us is that an obvious departure from its terms (or from the Union's practice in general), might well call for an explanation from the officers involved in order to rebut any inference of arbitrariness, discrimination, or bad faith. Here, once again, we have been satisfied that the Union's leadership were genuinely of the belief, on reasonable grounds, that the requirements of the Constitution for "ratification" had been met when the full "5-year Plan" was explained to the membership and voted on in July of 1988, and the inquiry before this Board extends no further.

31. On the basis of all of the evidence, therefore, including the detailed and credible testimony given before this Board by Mr. Baily and Mr. Crockett, the Board cannot conclude that the respondent Local 175 has acted in a manner that is arbitrary, discriminatory or in bad faith toward the employees it represents in the stores of the eastern Ontario area, and the complaint is dismissed.

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### 1143-90-OH Tim V. Pauley, Complainant v. Village Pool & Spa, Respondent

**Discharge - Health and Safety - Complainant discharged for objecting to standing near sandblasting where sand was irritating his face and eyes - Board ordering \$2,100 compensation for wage loss**

**BEFORE:** Robert Herman, Vice-Chair, and Board Members W. A. Correll and K. Davies.

**APPEARANCES:** Tim Pauley on his own behalf; no one appeared for the respondent.

**DECISION OF THE BOARD;** September 21, 1990

1. This is a complaint that the respondent employer has breached section 24(1) of the *Occupational Health & Safety Act*.

2. Although duly served with the relevant materials and the Notice of Hearing, the employer neither filed a Reply nor appeared at the hearing at the scheduled time and place. The Board waited approximately thirty-five minutes before commencing the hearing, in order to afford a further opportunity for the respondent or someone on its behalf to appear. No one however appeared at any time on behalf of the respondent employer.

3. The complainant, Mr. Pauley, performed installations and service work for the respondent employer. Around June 28, 1990, Mr. Pauley was directed to work on a job involving sand-blasting of a concrete pool. This was the first time that he had been required to perform such a job. His particular function was to operate the air, turning it off and on, and sweeping the sand back.

4. His foreman, Gary Verkaik, had instructed Mr. Pauley to work the air, but to stay well back from the sand spray, as he did not have a proper safety mask. For the first half hour or so, Mr. Pauley was able to stay well back from the sand, and by turning the air off before he swept the sand back, was able to avoid any problem with the swirling sand. However, at that point Gary Boone, his boss, came around and brought Mr. Pauley a small paper mask, to cover his nose and mouth. He did not bring Mr. Pauley any safety glasses. Mr. Boone instructed Mr. Pauley to move right up beside the sandblasting, as in that way the sand blaster could be operated continuously, and the job would take less time to complete. The co-worker who was actually doing the sandblasting, Irwin Long, was wearing a proper safety hood with a plexiglass eye panel.

5. Pursuant to Mr. Boone's instructions, Mr. Pauley tried for a time to stand near the sandblasting while the blasting was going on, wearing only the small paper mask, but he found that the swirling sand was getting in his face, and particularly his eyes. Mr. Pauley then advised Mr. Boone that he wanted a proper safety mask, that it was not safe to perform the job wearing only the small paper mask, and that he did not want to work that close to the swirling sand. Mr. Boone responded that if Mr. Pauley would not do the work, that was fine and Mr. Boone would then find someone else to do it and he advised Mr. Pauley to get out. In effect, Mr. Boone discharged Mr. Pauley. He gave Mr. Pauley a ride back to the office, where Mr. Pauley retrieved his truck and went home.

6. This was the last time that the complainant Mr. Pauley spoke to Mr. Boone. Mr. Pauley never heard from the company or Mr. Boone again. The complainant's final pay cheque was picked up by his father.

7. The Board also heard evidence concerning the amount of money lost by Mr. Pauley because of his discharge by Mr. Boone, and his inability to obtain alternative employment paying comparable wages. The complainant was not seeking reinstatement, but only compensation for the lost wages because of the allegedly improper discharge.

8. Section 24(1) of the *Occupational Health and Safety Act* reads as follows:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.



9. Having regard to the evidence, the Board is satisfied that the respondent employer breached section 24(1) of the Act in its discharge of the complainant, Mr. Pauley. Mr. Pauley was discharged because he was concerned for his safety and refused to work in an unsafe manner. He was acting in compliance with the Act in so refusing. His discharge therefore breached section 24(1).

10. With respect to the appropriate remedy, the Board is satisfied that Mr. Pauley suffered a direct loss because of this discharge in the amount of \$2,100.00. We hereby order that the respondent employer pay forthwith to the complainant the amount of \$2,100.00 as compensation.

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**0378-90-R Labourers' International Union of North America, Local 183, Applicant v. Vissers Nursery, Respondent**

**Certification - Construction Industry - Natural Justice - Practice and Procedure - Reconsideration - Terminal Date - Employer requesting reconsideration of certifications on grounds employees failed to receive notice - Employer pleading own failure either to post Notice of Application or to file Return of Posting Card - Union filed Advice of Posting Card but did not fill in necessary information - Union filing Card after terminal date - Not unreasonable to expect union to act with promptness and diligence in checking posting where union asking Board to exercise discretion to certify without a hearing - Board directing matter to be listed for hearing representations on notice issues**

**BEFORE:** *N. B. Satterfield*, Vice-Chair, and Board Members *W. Gibson* and *N. Wilson*.

**DECISION OF THE BOARD;** September 26, 1990

1. Two certificates were issued to the applicant pursuant to section 144(2) of the *Labour Relations Act* in this application for certification. One certificate was with respect to construction labourers employed by the respondent in the industrial, commercial and institutional (I.C.I.) sector of the construction industry in the Province of Ontario and the other with respect to construction labourers employed by the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham. These certificates were issued without a hearing in accordance with the Board's discretion under section 102(14) of the Act.

2. Approximately a month later, the respondent, through its solicitors, applied to the Board to have it reconsider and revoke its decision to certify the applicant. One of the grounds for reconsideration is that the employees did not receive proper notice of the application for certification. A copy of the respondent's request was sent to the applicant for comments. The applicant has made its reply in writing, opposing the application for reconsideration, and has sent a copy of its reasons to the respondent. The Board has received no further submissions from the solicitors for the respondent.

3. The application for certification was made on May 8, 1990 and the Board set May 23, 1990 as the terminal date for the application. The terminal date fixed for an application for certifi-

cation made under the construction industry provisions of the Act, as this one was, is the date by which the respondent is required to file its response to the application, the applicant is required to file its membership evidence in support of the application, and any employees who are opposed to the application are required to file their written statements of opposition.

4. On May 14, 1990 the Registrar sent to the respondent a notice of the application together with a copy of the application, a supply of notices to employees of the application, a form on which to reply to the application, forms on which to list the names of employees who would be in the bargaining unit sought by the applicant and a Return of Posting Card. The Registrar's instructions to the respondent include the instruction to post immediately the notices to employees "...in such conspicuous locations on your premises as may be necessary to bring this matter to the attention of your employees who may be affected by the application." The Registrar also instructed the respondent to return to the Board forthwith the duly completed Return of Posting Card. That card, properly completed, contains information as to the name and position of the representative of the respondent who completes it and information on the number of notices to employees which were posted, the time and date on which they were posted and is to be dated and signed by the respondent's representative.

5. On May 14, 1990 the Registrar acknowledged to the applicant receipt of the application, advised the applicant of the terminal date fixed for the application and notified the applicant of its obligation to file the membership evidence on which it would be relying. The material sent to the applicant with the Registrar's letter included an Advice of Posting Card, with respect to which the Registrar's letter states:

Failure of the employer to post these documents may result in delay and if there has been a failure to post, you should notify me immediately by *telephone or telegram*. Whether there has been a posting or not, the enclosed Advice of Posting Card should be *returned to me forthwith* duly completed.

[emphasis in the original]

The Advice of Posting Card asks for information on the posting in the following format:

File No. \_\_\_\_\_

Re:

I, \_\_\_\_\_ have ascertained  
(name of representative)

from employees affected by this application

that the Notices to Employees (Form \_\_\_\_\_)

were posted by the employer on \_\_\_\_\_

\_\_\_\_\_  
representative of applicant

6. The respondent did not reply to the application and did not file a Return of Posting Card. The applicant did file an Advice of Posting Card, signed by a representative of the applicant but without any information as to when the employer had posted the Board's notices to employees.

7. No statements of objections from employees were filed.

8. The alleged facts on which the respondent relies for making its application for reconsideration include the fact that the respondent failed to comply in a timely fashion with the Board's instructions to post its notices to employees. That allegation carries with it the clear inference that employees whose rights may have been affected by the application did not have due notice of it and that the Board should remedy that defect by reconsidering "...the Certification of Labourers' International Union of North America, Local 183 as the bargaining agent for the construction labourers in the employ of Vissers Nursery."

9. The Board's jurisdiction to reconsider a decision comes from subsection 106(1) of the Act which gives the Board the discretion to "...reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling." For the reasons stated in *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185, at paragraph 4, the Board has been cautious in the exercise of its discretion in order to preserve the finality of its decisions. In this case, the respondent's application for reconsideration is based primarily on the allegation that it failed to post the Board's notices to employees, as a result of which employees whose rights might be affected by the application have not had proper notice of it. The Board notes that, in the period between June 24th and July 6th, it received letters from four persons purporting to be employees of the respondent affected by the application. None alleges that he/she did not have notice of the application. Nor did any one of them request the Board to reconsider its decision. The Board has often said that an employer is not empowered to act on behalf of employees in matters concerning their choice of a trade union as their exclusive bargaining agent or their opposition to a trade union.

10. In the Board's view, these are not circumstances in which the Board ordinarily might exercise its discretion to reconsider a decision. Rather, they are circumstances in which the panel herein would have dismissed the application for reconsideration without a hearing. However, in this case and for the reasons given below, the Board is not prepared to dismiss the application without a hearing.

11. As paragraph 4 indicates, the materials sent to the employer named as respondent to an application for certification includes notices to employees and a direction to the employer to post the notices. These notices advise the employees of the application and their rights to participate in it. It is the legal obligation of the respondent to an application for certification to make sure that the notices are posted. The Board is concerned that employees whose rights are likely to be affected by an application are given proper notice of it. For that reason, the Board seeks information from both the applicant and the respondent described above in paragraphs 4 and 5 with respect to the posting of its notices to employees. When the Board is aware that the employer has not posted the notices to employees, it will exercise its powers under clauses (e) and (g) of subsection 103(2) of the Act to authorize a Board officer to enter the premises or job sites where employees of the respondent are working and make the posting. If the Board has not been promptly advised of the posting problem, it may be necessary to extend the terminal date fixed for the application in order for proper notice to be given to employees, thus delaying the application's processing. Therefore, by being prompt in checking to see whether the employer has posted the Board's notices, the applicant's representative can avoid the delay caused by the need to extend the terminal date. Applicants under the construction industry provisions of the Act are duly forewarned of the risk of delay by the passage quoted above from the Registrar's instructions to the applicant.

12. In this application it would appear that the representative of the applicant was not prompt in checking on the posting. As noted above, the Registrar's notice to the applicant acknowledging the application and instructing the applicant on filing the Advice of Posting Card was sent on May 14, 1990. The Advice of Posting Card was received by the Board on May 24,



1990, one day after the terminal date. The applicant's representative was not diligent either. If the representative did ascertain that the posting had been made, he failed to indicate the date on which it was observed to have been made. If he ascertained the contrary, he failed to record that information on the Advice of Posting Card. The result for this application is that there is nothing on the Board's record from which the Board might satisfy itself that employees affected by the application had proper notice of it.

13. It is not too much to ask of an applicant, who expects the Board to exercise its discretion to process the application for certification without a hearing, to investigate or ascertain from employees affected by the application whether the Board's notices to employees have been posted, to properly complete and duly file an Advice of Posting Card. This is particularly so when the important rights which flow from certification under section 144(2) of the Act are considered. When the certificates were issued to the applicant in this application, in addition to the applicant becoming the exclusive bargaining agent of the respondent's construction labourers employed in the bargaining unit described in the certificates, the applicant and the respondent became bound immediately to the provincial agreement for construction labourers, pursuant to subsection 145(4) of the Act.

14. In the circumstances of this application for reconsideration, since the Board cannot be satisfied that employees whose rights may be affected by the application were given proper notice of it, the Board considers it appropriate to list this matter for hearing for the purposes of receiving the evidence and representations of the parties respecting whether employees received proper notice of the application for certification and, if not, what effect that should have on the certificates which have been issued to the applicant.

15. Accordingly, the Registrar is directed to list these matters for hearing and to serve notice in the Board's customary manner on the parties and the employees. The respondent is directed to post copies of this decision together with copies of the Board's Notice of Hearing in conspicuous places where they are most likely to come to the attention of all employees who may be affected by these matters. The copies of the decision and notice are to remain posted until the close of business on the day of hearing. The respondent is directed further to furnish forthwith to the Board the names and addresses of record of all construction labourers who, as at May 8, 1990, were employed by the respondent in the bargaining unit described in this application. In the circumstances of this case, in addition to serving notice in the customary manner as stated above, it is appropriate also that the Registrar serve the individual employees at the addresses supplied by the respondent with a Notice of Hearing and copy of the Board's decision.

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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1990

### APPLICATIONS FOR CERTIFICATION

#### Bargaining Agents Certified Without Vote

**1619-89-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Romatt Custom Woodwork Inc. (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (78 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**1879-89-R:** United Steelworkers of America (Applicant) v. American Barrick Resources Corporation c.o.b. as Holt-McDermott Mine (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent Holloway Township, save and except forepersons/supervisors, persons above the rank of foreperson/supervisor, office, clerical, sales and technical employees and students employed during the school vacation period" (172 employees in unit)

**2428-89-R:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Kanatrim Lumber & Door Company (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (72 employees in unit)

**2653-89-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Lume Masonry Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**2933-89-R:** Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 91 (Applicant) v. National News Company Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Regional Municipality of Ottawa Carleton, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (42 employees in unit) (*Having regard to the agreement of the parties*)



**0525-90-R:** Canadian Paperworkers Union (Applicant) v. Mel Hall Transport Ltd. and 444024 Ontario Ltd. (Respondents)

Unit: "all employees of Mel Hall Transport Limited and 444024 Ontario Limited working at and out of the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, dispatcher, office, clerical and sales staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

**0635-90-R:** Canadian Union of Public Employees (Applicant) v. The Board of Health for the Peterborough County-City Health Unit (Respondent)

Unit: "all employees of the respondent in Peterborough County and the City of Peterborough, save and except supervisors, persons above the rank of supervisor, persons for whom any trade union held bargaining rights as of May 29, 1990, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (52 employees in unit) (*Having regard to the agreement of the parties*)

**0646-90-R:** Labourers' International Union of North America, Local 607 (Applicant) v. Westcon Restoration & Waterproofing Inc. (Respondent) v. International Brotherhood of Painters & Allied Trades, Local 1671 (Intervener)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

**0708-90-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. Aviscar Inc. c.o.b. as Avis Car Rental (Respondent)

Unit: "all employees of the respondent at its Cargo Road Garage, Mississauga, Ontario, save and except garage supervisor, persons above the rank of garage supervisor, office staff, mechanics, car carrier drivers and helpers, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and employees for whom any trade union held bargaining rights as of June 7, 1990" (19 employees in unit) (*Having regard to the agreement of the parties*)

**0818-90-R:** Labourers' International Union of North America, Local 527 (Applicant) v. Tarma-Seal Construction Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

**0861-90-R:** London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Steeves & Rozema Enterprises Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent at 711 Indian Road N. in Sarnia, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than 24 hours per week" (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*)

**0890-90-R** The Association of Allied Health Professionals: Ontario (Applicant) v. The Eastern Ontario Health Unit (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all paramedical employees of the Respondent in Eastern Ontario, save and except supervisors, persons

above the rank of supervisor and persons for whom any trade union held bargaining rights as of June 22, 1990,” (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0916-90-R:** Canadian Union of Public Employees (Applicant) v. The Board of Health for the Borough of East York Health Unit (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except managers, persons above the rank of manager, administrative assistant, dental hygienist, resource coordinator, computer systems and financial coordinator, secretary to the medical officer of health, secretary to the associate medical officer of health, students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of June 29, 1990” (26 employees in unit) (*Having regard to the agreement of the parties*)

**0950-90-R:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Robert Gauvreau Installation Ltee. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

**0956-90-U:** International Brotherhood of Painters & Allied Trades, Local 1795 - Glazier (Applicant) v. Applewood Glass & Mirror Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all journeymen and apprentice glaziers and metal mechanics in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice glaziers and metal mechanics in the employ of the respondent in all sectors of the construction industry in the the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

**0960-90-R:** Canadian Union of Public Employees (Applicant) v. College Notre-Dame, Institution (Respondent)

Unit: “all employees of the respondent, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*)

**0965-90-R:** Niagara Health Care & Service Workers Union, Local 302 affiliated with Christian Labour Association of Canada (Applicant) v. West Lincoln Memorial Hospital (Respondent)

Unit #1: “all employees of the respondent in the Town of Grimsby, save and except supervisors, Assistant Director of Maintenance, Assistant Director of Housekeeping/Linen/Laundry and persons above the rank of supervisor, Assistant Director of Maintenance, Assistant Director of Housekeeping/Linen/Laundry, paramedical employees, professional medical staff, graduate and registered nurses, office and clerical employees, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of July 9, 1990” (51 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all employees of the respondent in the Town of Grimsby regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, Assistant Director of Maintenance, Assistant Director of Housekeeping/Linen/Laundry and persons above the rank of supervisor, Assistant Director of Maintenance, Assistant Director of Housekeeping/Linen/Laundry, paramedical employees, professional medical staff, graduate and registered

nurses, office and clerical employees and persons for whom any trade union held bargaining rights as of July 9, 1990" (62 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0982-90-U:** Service Employees Union, Local 210 (Applicant) v. Women's House of Bruce Fisher (Respondent)

Unit: "all employees of the respondent in Kincardine, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (5 employees in unit) (*Having regard to the agreement of the parties*)

**0991-90-R:** Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 880 (Applicant) v. Hume Contractors Ltd. (Respondent)

Unit: "all employees of the respondent in Watford, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and employees in bargaining units for whom any trade union held bargaining rights as of July 10, 1990" (5 employees in unit) (*Having regard to the agreement of the parties*)

**0992-90-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Horton Services Inc. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**0993-90-R:** Labourers' International Union Oil & Gas Technicians, Service, Domestic & General Workers, Local 1267 (Applicant) v. Laidlaw Waste Systems Ltd. (Barrie Division) (Respondent)

Unit: "all employees of the respondent in the City of Barrie and Simcoe County, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

**1000-90-R:** Canadian Paperworkers Union (Applicant) v. Port Arthur Lumber & Planing Mill Ltd. (Respondent)

Unit: "all employees of the respondent in the District of Thunder Bay, save and except managers and foremen, persons above the rank of manager and foreman, office and sales staff" (23 employees in unit) (*Having regard to the agreement of the parties*)

**1044-90-R:** United Steelworkers of America (Applicant) v. Occupational Health Clinic for Ontario Workers (Toronto) Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except the director, persons above the rank of director, and medical professionals entitled to practise in Ontario and employed in a professional capacity" (5 employees in unit) (*Having regard to the agreement of the parties*)

**1055-90-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Les Forages Kennebec Ltee./Kennebec Drilling Ltd. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)



**1116-90-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Harnden & King Construction, A Division of George Wimpey Canada Ltd. (Respondent)

Unit: “all employees of the respondent in all sectors of the construction industry in the the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (19 employees in unit)

**1117-90-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Harnden & King Construction, A Division of George Wimpey Canada Ltd. (Respondent)

Unit: “all employees of the respondent at Green’s Pit in the township of Front of Leeds and Lansdowne, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (27 employees in unit)

**1141-90-R:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Pacer Panel Systems Inc. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**2682-89-R:** The Independent Canadian Transit Union (Applicant) v. Modern Building Cleaning Inc. (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: “all employees of Modern Building Cleaning Inc., engaged in cleaning services at Riverside Hospital Ottawa, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff” (37 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	36
Number of persons who cast ballots	27
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	21
Number of ballots marked in favour of intervener	5

**0010-90-R:** Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Local No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Primo Foods Ltd. (Respondent) v. Canadian Foods workers Union (Intervener #1) v. United Food & Commercial Workers International Union (Intervener #2)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff and students employed during the school vacation period” (212 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	203
Number of persons who cast ballots	181
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	72
Number of ballots marked in favour of intervener #2	106

**0637-90-R:** Energy & Chemical Workers Union (Applicant) v. Stanley Canada Inc. (Respondent) v. Teamsters Local No. 879, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener)

Unit: "all employees of the respondent in its Stanley Door Systems Division in the Town of Wingham, save and except foremen, persons above the rank of foreman, office and sales staff" (82 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	77
Number of persons who cast ballots	64
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	41
Number of ballots marked in favour of intervener	22

### **Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**0609-90-R:** United Steelworkers of America (Applicant) v. Hunter Enterprises Orillia, Ltd. (Respondent) v. Sheet Metal Workers' International Association, Local 542 (Intervener)

Unit: "all employees of the respondent, save and except foremen, persons above the rank of foreman and office staff" (48 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	47
Number of persons who cast ballots	43
Number of ballots marked in favour of applicant	33
Number of ballots marked in favour of intervener	10

### **Applications for Certification Dismissed Without Vote**

**1319-89-R:** Teamsters Local No. 230, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Custom Concrete (Division of St. Lawrence Cement Inc.) (Respondent) v. Group of Employees (Objectors) (15 employees in unit)

**0752-90-R, 0753-90-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Wilson & Somerville Ltd. (Respondent) (2 employees in unit)

**0771-90-R:** Labourers' International Union of North America, Local 1081 (Applicant) v. Melloul-Blamey Construction Ltd. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 2451 (Intervener) v. Group of Employees (Objectors) (14 employees in unit)

**0819-90-R:** Labourers' International Union of North America, Local 527 (Applicant) v. Tarma-Seal Construction Inc. (Respondent) v. Group of Employees (Objectors) (12 employees in unit)

**1171-90-R:** Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartender's International Union (Applicant) v. 647842 Ontario Ltd. c.o.b. Trax Toronto Restaurant (Respondent) v. Group of Employees (Objectors) (25 employees in unit)

### **Applications for Certification Dismissed Subsequent to a Post-Hearing Vote**

**2149-89-R:** Sudbury Mine, Mill & Smelter Workers' Union, Local 598 of the Canadian Union of Mine, Mill & Smelter Workers (Applicant) v. Minnova Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its Winston Lake Division in the District of Thunder Bay, save and except forepersons, those above the rank of foreperson, office, clerical, technical and sales staff, students employed during the school vacation period and students employed on a co-operative work study program" (105 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	105
Number of persons who cast ballots	95

Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	56
Ballots segregated and not counted	4

**0861-90-R:** London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Steeves & Rozema Enterprises Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent at 711 Indian Road N. in Sarnia regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	4

**0874-90-R:** Teamsters Local No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Country Building Supplies Ltd. (Respondent)

Unit: "all employees of the respondent in Sunderland, save and except foremen, persons above the rank of foreman, office, and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (14 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	9

### Applications for Certification Withdrawn

**2332-89-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Ault Foods Ltd. (Respondent)

**0504-90-R:** United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. The House of Broadloom Ltd. (Respondent)

**0820-90-R:** Labourers' International Union of North America, Local 527 (Applicant) v. Tarma-Seal Construction Inc. (Respondent)

**0913-90-R:** Niagara Health Care & Service Workers Union affiliated with Christian Labour Association of Canada (Applicant) v. West Lincoln Memorial Hospital (Respondent)

**0929-90-R:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Applicant) v. Thermogenics Inc. (Respondent)

**0961-90-R:** Canadian Union of Public Employees (Applicant) v. Sudbury General Hospital of the Immaculate Heart of Mary (Respondent) v. Group of Employees (Objectors)

**0996-90-R; 0997-90-R; 0998-90-R; 0999-90-R:** Labourers' International Union of North America, Local 1089 (Applicant) v. Phoenix Masonry Construction Corp. (Respondent) v. Labourers' International Union of North America, Local 1059 (Intervener) v. International Union of Bricklayers & Allied Craftsmen, Local 23 (Intervener) v. International Union of Bricklayers & Allied Craftsmen, Local 5 (Intervener)



**1021-90-R:** Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 880 (Applicant) v. Hume Contracting Ltd. (Respondent)

**1043-90-R:** United Steelworkers of America (Applicant) v. The Mississauga Hospital (Respondent) v. Group of Employees (Objectors)

**1166-90-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ross Recycling Ltd. and/or Chevron Construction (Respondents)

**1230-90-R:** International Union of Bricklayers & Allied Craftsmen, Local 25 (Applicant) v. Copetti Masonry Contractors Ltd. (Respondent)

## APPLICATIONS FOR FIRST CONTRACT ARBITRATION

**2740-89-FC:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Venture Industries Canada, Ltd. (Respondent) (*Granted*)

**0079-90-FC:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 673 (Applicant) v. Bourque Consumer Electronics Service Inc. (Respondent) (*Granted*)

**0587-90-FC:** International Union of Operating Engineers, Local 793 (Applicant) v. Innisfil Landfill Corporation (Respondent) (*Withdrawn*)

**1252-90-FC:** Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 880 (Applicant) v. Canada Building Materials Company (Respondent) (*Granted*)

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**1367-89-R:** United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Kent Acoustics Ltd., City Acoustics Ltd., J.L. Acoustics Ltd. (Respondents) (*Granted*)

**0121-90-R:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Abreu-Marchetti Drywall Ltd. and Abreu Contractors Ltd. (Respondents) (*Dismissed*)

**0335-90-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Concrete Column Clamps (C.C.C.) Ltd./Les Coffrages C.C.C. Ltee.; Fix Fast Ltd.; Bona Building & Management Company Ltd. (Respondents) (*Dismissed*)

**0481-90-R:** Teamsters Local Union No. 879 (Applicant) v. Victoria Transport Inc. and Trent Leasing Ltd. (Respondents) (*Withdrawn*)

**0583-90-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Gordon Mulligan Construction Ltd. and John Munharvey's Rentals Ltd. (Respondents) (*Withdrawn*)

**0588-90-R:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Cosnaut Steel Inc. and Pacific Steel Co. (Respondents) (*Withdrawn*)

**0838-90-R:** Canadian Paperworkers Union (Applicant) v. Mel Hall Transport Ltd. and 444024 Ontario Ltd. (Respondents) (*Granted*)

**0984-90-R:** United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. N.L. Smith Construction Group Inc., Nordal Construction Ltd., Auburn Contractors Inc., Brendan Construction Ltd., and Master Brendan Industrial Services Ltd. (Respondents) v. United Steelworkers of America (Intervener) (*Granted*)

## SALE OF A BUSINESS

**1367-89-R:** United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Kent Acoustics Ltd., City Acoustics Ltd., J.L. Acoustics Ltd. (Respondents) (*Granted*)

**2803-89-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. Ema Store (839086 Ontario Inc., c.o.b. as Gillett Ema) and The Great Atlantic & Pacific Company of Canada Ltd. (Respondents) v. Elliott Marr & Company Ltd. (Intervener) (*Withdrawn*)

**0121-90-R:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Abreu-Marchetti Drywall Ltd. and Abreu Contractors Ltd. (Respondents) (*Dismissed*)

**0135-90-R:** Soft Drink Workers Joint Local Executive Board of Ontario of the United Food & Commercial Workers International Union (Applicant) v. Pepsi-Cola & Seven-Up (Respondent) (*Withdrawn*)

**0335-90-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Concrete Column Clamps (C.C.C.) Ltd./Les Coffrages C.C.C. Ltee.; Fix Fast Ltd.; Bona Building & Management Company Ltd. (Respondents) (*Dismissed*)

**0481-90-R:** Teamsters Local Union No. 879 (Applicant) v. Victoria Transport Inc. and Trent Leasing Ltd. (Respondents) (*Withdrawn*)

**0583-90-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Gordon Mulligan Construction Ltd. and John Munharvey's Rentals Ltd. (Respondents) (*Withdrawn*)

**0589-90-R:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Cosnaut Steel Inc. and Pacific Steel Co. (Respondents) (*Withdrawn*)

**0857-90-R:** Ontario Nurses Association (Applicant) v. Spencer Brothers Nursing Home and/or John Daramsing in Trust and Martino Brothers Nursing Home and/or Norcliffe Lifecare Centre (Respondents) (*Withdrawn*)

**0588-90-R:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Cosnaut Steel Inc. and Pacific Steel Co. (Respondents) (*Withdrawn*)

**0866-90-R:** Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employee's & Bartenders' Int'l Union (Applicant) v. River Inn (Respondent) (*Withdrawn*)

**0983-90-R:** United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. N.L. Smith Construction Group Inc., Nordal Construction Ltd., Auburn Contractors Inc., Brendan Construction Ltd., and Master Brendan Industrial Services Ltd. (Respondents) v. United Steelworkers of America (Intervener) (*Withdrawn*)

**1074-90-R:** United Steelworkers of America (Applicant) v. Canadian Plating Rack (1988) Inc. (Respondent) (*Withdrawn*)

## CROWN TRANSFER ACT

**0955-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and New Forest Contractors Inc. (Respondents) (*Granted*)

**1331-88-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Roots Reforestation (Ontario) Ltd. (Respondents) (*Granted*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**2693-89-R:** Robert Hillman - on behalf of the employees of W. H. Smith Inc. (Applicant) v. Canadian Paperworkers Union and its Local 1144 C.L.C. (Respondent) v. W.H. Smith Inc. (Intervener)

Unit: "all employees of W.H. Smith Inc. (Warehouse) in the Municipality of Metropolitan Toronto, save and except supervisors, and the senior lead hand, persons above the rank of supervisor and the senior lead hand, sales staff, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	20
Number of ballots marked in favour of respondent	8
Number of ballots marked against respondent	12

**2760-89-R:** Judy Smith (Applicant) v. Service Employees' Union, Local 210 affiliated with Service Employees' International Union (Respondent) v. Charlotte Eleanor Englehart Hospital (Intervener) (7 employees in unit) (*Dismissed*)

**3171-89-R:** Christopher Clayton and Guiseppe Tocci (Applicants) v. United Steelworkers of America (Respondent) v. Benoma Metal Products Ltd. (Intervener) (49 employees in unit) (*Dismissed*)

**0319-90-R:** Lin Lapensee (Applicant) v. Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 880 (Respondent) v. The Butcher Engineering Enterprises Ltd. (Intervener)

Unit: "all employees of the Butcher Engineering Enterprises Limited in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (19 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	18
Number of persons who cast ballots	15
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	10

**1176-90-R:** Tracy Delmo (Applicant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**1424-89-U:** Marcia Robertson (Complainant) v. United Food & Commercial Workers International Union, AFL-CIO, Local 114P (Respondent) v. Canada Packers Inc. (Intervener) (*Granted*)

**1797-89-U:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Edscha of Canada (Respondent) (*Withdrawn*)

**2017-89-U:** Richard Coates (Complainant) v. Amalgamated Transit Union, Local 1572 and Ron Whittingham, President (Respondents) (*Withdrawn*)

**2743-89-U:** Labourers' International Union of North America, Local 527 (Complainant) v. Fidecon Corporation (Respondent) (*Granted*)

**2752-89-U:** Toronto Typographical Union No. 91, Affiliated Local of the Communications Workers of North America, Printing Publishing, and Media Workers Sector (Complainant) v. Modern Wrappings Ltd. (Respondent) (*Withdrawn*)



**2808-89-U:** Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Lume Construction Ltd. and/or Lume Masonry Ltd. (Respondent) (*Withdrawn*)

**3041-89-U:** Mr. Romeo L. King (Complainant) v. International Union of Operating Engineers, Local 796 (Respondent) (*Withdrawn*)

**3201-89-U:** Service Employees' Union, Local 210, Affiliated with Service Employees' International Union, AFL:CIO:CLC: (Complainant) v. Brouillette Manor Ltd. (Respondent) (*Withdrawn*)

**3251-89-U:** Hotels, Clubs, Restaurants, Taverns, Employees Union, Local 261 (Complainant) v. Talisman Motor Inn (Respondent) (*Withdrawn*)

**3275-89-U:** Canadian Paperworkers Union, Local 134 (Complainant) v. Abitibi-Price Inc. (Respondent) (*Withdrawn*)

**0165-90-U:** IWA-Canada, Local 2693 (Complainant) v. Paramount Transportation Ltd. (Respondent) (*Withdrawn*)

**0180-90-U:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Norman A. Faucher Ltd., Norman A. Faucher, John Faucher (Respondents) (*Withdrawn*)

**0186-90-U:** William Egan (Complainant) v. Murray G. Bulger Group (Respondent) (*Withdrawn*)

**0187-90-U:** Gerald Hymes (Complainant) v. Murray G. Bulger Group (Respondent) (*Withdrawn*)

**0199-90-U:** The Ontario Secondary School Teachers' Federation (Complainant) v. The Windsor Board of Education (Respondent) (*Withdrawn*)

**0205-90-U:** Norman Ervine (Complainant) v. Murray G. Bulger Group (Respondent) (*Dismissed*)

**0287-90-U:** Canadian Union of Public Employees (Complainant) v. Southern Ontario Library Service (Respondent) (*Withdrawn*)

**0376-90-U:** Teamsters, Local Union 419 (Complainant) v. Diplomat Coffee Systems (Respondent) (*Withdrawn*)

**0387-90-U:** Canadian Union of Public Employees and its Local 3009 (Complainant) v. Rygiel Home (Respondent) (*Withdrawn*)

**0401-90-U:** International Association of Machinists & Aerospace Workers, District Lodge 717 (Complainant) v. Peacock Inc. (Respondent) (*Withdrawn*)

**0438-90-U:** Lewis Bennett (Complainant) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Respondent) (*Dismissed*)

**0519-90-U:** Margaret St. Pierre (Complainant) v. Service Employees' Union, Local 210 (Respondent) (*Withdrawn*)

**0600-90-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. S & R Department Store (1976) Ltd. (Respondent) (*Withdrawn*)

**0605-90-U:** Service Employees' International Union, Local 204 (Complainant) v. Willowood Personnel Services Ltd. and The Grenadier (Respondents) (*Withdrawn*)

**0622-90-U:** Peter Calixte (Complainant) v. Local 6500 - United Steelworkers of America (Respondent) (*Withdrawn*)

**0659-90-U:** Southern Ontario Newspapers Guild, Local 87, The Newspaper Guild (CLC, AFL-CIO) (Complainant) v. The Oshawa Times, A Division of Thomoson Newspapers Co. Ltd. (Respondent) (*Withdrawn*)

**0662-90-U:** Jean Patricia Nevin (Complainant) v. A.T.U., Local 1573 (Respondent) (*Withdrawn*)

**0663-90-U:** Energy & Chemical Workers Union, Local 593 (Complainant) v. Atochem (formerly Pennwalt Canada Inc.) (Respondent) (*Withdrawn*)

**0664-90-U:** Brian Gillard (Complainant) v. Trillium Meats and United Food & Commercial Workers International Union (633) (Respondents) (*Withdrawn*)

**0675-90-U:** Canadian Union of Public Employees, Local 3461 (Complainant) v. Toronto Humane Society (Respondent) (*Withdrawn*)

**0709-90-U:** Maria D. A. Medeiros (Complainant) v. Maple Lodge Farms (Respondent) (*Withdrawn*)

**0727-90-U:** George Broderick (Complainant) v. Nestle's Enterprise (formerly Laura Secord) (Respondent) v. Brewery Malt & Soft Drink Workers, Local 304 (Intervener) (*Withdrawn*)

**0733-90-U; 0734-90-U:** Metropolitan Toronto Sewer & Watermain Contractors Association (Complainant) v. Ontario Paving Company Ltd. and Carmen Alfano (Respondent) (*Withdrawn*)

**0737-90-U:** International Brotherhood of Painters & Allied Trades, Local 1891 (Complainant) v. Mike's Painting & Decorating (Respondent) (*Withdrawn*)

**0741-90-U:** Ontario Public Service Employees Union (Complainant) v. Deep River & District Hospital (Respondent) (*Withdrawn*)

**0749-90-U:** London & District Services Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Maplewood Nursing Home (Respondent) (*Withdrawn*)

**0759-90-U:** Teamsters Local Union No. 419 (Complainant) v. Grenville Management & Printing Ltd. (Respondent) (*Withdrawn*)

**0809-90-U:** John Thyret (Complainant) v. C.U.P.E., Local 468 (Respondent) (*Withdrawn*)

**0811-90-U:** Ontario Public Service Employees Union (Complainant) v. Hotel Dieu Hospital (Respondent) (*Withdrawn*)

**0828-90-U:** Carver C. Alcindor (Complainant) v. Canadian Union of Postal Workers (Respondent) (*Withdrawn*)

**0836-90-U:** Service Employees' International Union, Local 204 (Complainant) v. Willowood Personnel Services Ltd. and 582958 Ontario Ltd. (Respondents) (*Withdrawn*)

**0875-90-U:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Kuriyama Canada Inc. (Respondent) (*Withdrawn*)

**0882-90-U:** United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC: (Complainant) v. Carewell Corporation c.o.b. Bracebridge Villa (Respondent) (*Withdrawn*)

**0895-90-U:** James Watson (Complainant) v. Port Weller Dry Docks, A Division of Canadian Shipbuilding & Engineering Ltd. (Respondent) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 680 (Intervener) (*Dismissed*)

**0905-90-U:** Doug Nisbet (Complainant) v. Canadian Brotherhood of Railway Transport & General Workers (C.B.R.T. & G.W. Local 0184 (Respondent) (*Withdrawn*)

**0910-90-U:** Cyril Hardiman (Complainant) v. United Food & Commercial Workers International Union, Local 114P (Respondent) (*Withdrawn*)

**0939-90-U:** Floyd Patterson (Complainant) v. Cambridge Employees Association (Respondent) v. Cambridge Motor Hotel (Intervener) (*Dismissed*)

**0945-90-U:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Mid-Point Manufacturing Inc. (Respondent) (*Withdrawn*)

**0955-90-U:** Ontario Nurses' Association (Complainant) v. The Corporation of the County of Hastings (Respondent) (*Dismissed*)

**0977-90-U:** Archie Bovin (Complainant) v. C.P.U., Local 156 (Respondent) (*Withdrawn*)

**0980-90-U:** United Food & Commercial Workers International Union, Local 175 - AFL-CIO-CLC (Complainant) v. Loeb Parkways West (Respondent) (*Withdrawn*)

**0985-90-U:** United Brotherhood of Carpenters & Joiners of America, Local 2486 (Complainant) v. N.L. Smith Construction Group Inc., Nordal Construction Ltd. (Respondents) v. United Steelworkers of America (Intervener) (*Granted*)

**0990-90-U:** Christopher J. Brennan (Complainant) v. A.T.U., Local 113 and the T.T.C. (Respondents) (*Withdrawn*)

**0995-90-U:** Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 880 (Complainant) v. Canada Building Materials Company (Respondent) (*Withdrawn*)

**1072-90-U:** Allen D. Muir (Complainant) v. Local 199, Canadian Auto Workers, Genaire Unit (Respondent) (*Withdrawn*)

**1173-90-U:** Ruth LeRoux, Reg. N. (Complainant) v. Geoff McPhee, President OPSEU, Local 636, Jackie Lyon, PNA - Union Steward OPSEU, Local 636, John Agius, Reg. N. - Union Steward OPSEU, Local 636 (Respondents) (*Dismissed*)

**1301-90-U:** Co-Fo Concrete Forming Construction Ltd. (Complainant) v. Everett Winegarden, et al and Teamsters Union, Local 141 (Respondents) (*Withdrawn*)

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**0404-90-M:** Essex Linen Supply Ltd. (Employer) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

## **JURISDICTIONAL DISPUTES**

**2564-88-JD:** 539385 Ontario Inc. c.o.b. under the firm name and style of 'Mev Group' (Complainant) v. Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 607, Millwrights District Council of Ontario & Millwrights', Local 1151 (Respondents) (*Granted*)

**0862-89-JD:** Syndicat Québécois de l'Industrie et des Communications, Local 145 (Complainant) v. Le Droit - Division du groupe Unimédia Inc. (Respondent) (*Withdrawn*)



## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**1187-89-M:** The Corporation of the City of Kitchener (Applicant) v. Canadian Union of Public Employees, Local 791 (Respondent) (*Withdrawn*)

**2339-89-M; 0428-90-M:** C.U.P.E., Local 1997 (Applicant) v. Eastern Ontario Health Unit (Respondent) (*Withdrawn*)

**2362-89-M:** Greater Northern Ontario Trucking Association (Applicant) v. Ethier Sand & Gravel Ltd. (Respondent) (*Dismissed*)

**2781-89-M:** Ontario Nurses' Association (Applicant) v. Queen Elizabeth Hospital (Respondent) (*Withdrawn*)

**0025-90-M:** Ontario Nurses' Association (Applicant) v. Toronto General Hospital (Respondent) (*Granted*)

**0366-90-M:** Canadian Union of Public Employees, Local 1752 (Applicant) v. The Haldimand Board of Education (Respondent) (*Withdrawn*)

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**0107-90-OH:** Manuel Puche (Complainant) v. Bo Ramjit (Respondent) (*Granted*)

**0130-90-OH:** Brian Parsons (Complainant) v. Norton Steel Company Ltd., c.o.b. as Norton Steel & Tube (Respondent) (*Dismissed*)

**0313-90-OH:** Ken Sackrider (Complainant) v. Fisher Controls (Respondent) (*Withdrawn*)

**0347-90-OH:** Chris Conrad (Complainant) v. Zalev Brothers Ltd. (Respondent) (*Withdrawn*)

**0595-90-OH:** Mr. David Vittie (Complainant) v. Murdza Contracting Ltd. (Respondent) (*Withdrawn*)

**0647-90-OH:** Canadian Union of Public Employees, Local 210 (Complainant) v. The Corporation of the City of Timmins (Respondent) (*Withdrawn*)

**0685-90-OH:** Byron Wood, Derrick Anderson, Louis Klein, Chris Campbell & Peter Potjewyd (Complainants) v. Mr. H. S. Leem and Hyundai Auto Canada Ltd. (Respondents) (*Withdrawn*)

**0948-90-OH:** Dwayne William Sewell (Complainant) v. Umacs of Canada Inc. (Respondent) (*Withdrawn*)

## CONSTRUCTION INDUSTRY GRIEVANCES

**0341-87-G:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. Catalyst Technology (Canada) Ltd. (Respondent) v. Boilermaker Contractors' Association (Intervener) (*Withdrawn*)

**2567-88-G:** Labourers' International Union of North America, Local 1036 (Applicant) v. Future Care Ltd. and Kuco Construction Ltd. (Respondents) (*Granted*)

**3025-88-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 67 (Applicant) v. State Contractors Inc. (Respondent) (*Dismissed*)

**3249-89-G:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Ellis-Don Construction Ltd. (Respondent) (*Withdrawn*)

**2942-89-G:** Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 23, Sarnia, Ontario (Applicant) v. A. Gorgi Masonry (1976) Ltd. (Respondent) (*Withdrawn*)

**3224-89-G:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Cote & Ryde Construction Ltd. (Respondent) (*Withdrawn*)

**0114-90-G:** International Brotherhood of Painters & Allied Trades, Local 1904 (Applicant) v. Nickel Belt Aluminum of Sudbury Ltd. (Respondent) (*Withdrawn*)

**0136-90-G:** United Brotherhood of Carpenters & Joiners of America, Lake Ontario District Council (Applicant) v. Thomas Fuller Construction (Respondent) (*Withdrawn*)

**0247-90-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Cosnaut Steel Inc. (Respondent) (*Withdrawn*)

**0346-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. N.L. Smith Construction Group Inc., Nordal Construction Ltd. (Respondents) v. United Steelworkers of America (Intervener) (*Withdrawn*)

**0399-90-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Towland (London) 1970 Ltd. (Respondent) (*Withdrawn*)

**0416-90-G; 0877-90-G:** Labourers' International Union of North America, Local 1036, Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. Louis LeBlanc Excavating Ltd. (Respondent) (*Granted*)

**0610-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. B. J. Normand Ltd. (Respondent) (*Withdrawn*)

**0611-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Korban Inc. (Respondent) (*Withdrawn*)

**0612-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Murphy & Morrow (Respondent) (*Withdrawn*)

**0739-90-G; 0740-90-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Freedom Valley Design Inc. (Respondent) (*Granted*)

**0777-90-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Ranac Forming Ltd. (Respondent) (*Withdrawn*)

**0807-90-G:** Labourers' International Union of North America, Local 183 (Applicant) v. L.P.S. Excavating & Grading (Respondent) (*Withdrawn*)

**0808-90-G:** National Painting & Decorating (Hamilton) Ltd. (Applicant) v. International Brotherhood of Painters & Allied Trades, Local 205 and Fred Farkas (Respondents) (*Withdrawn*)

**0821-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Eton Construction (Respondent) (*Withdrawn*)

**0843-90-G:** Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 493 (Applicants) v. Bot Construction & Clarkson Construction Company (Respondents) (*Withdrawn*)

**0847-90-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Four Seasons Homes Ltd. (Respondent) (*Withdrawn*)

**0880-90-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Howden Canada, A Division of Howden Group Canada Ltd. (Respondent) (*Withdrawn*)

**0885-90-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Bre-Ex Ltd. (Respondent) (*Withdrawn*)

**0886-90-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 599 (Applicant) v. Bennett Mechanical Installations Ltd. (Respondent) (*Withdrawn*)

**0892-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Big H Construction Ltd. (Respondent) (*Withdrawn*)

**0893-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. G. J. Trim (Respondent) (*Withdrawn*)

**0894-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. 846521 Ontario Inc. (Respondent) (*Withdrawn*)

**0896-90-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Co-Fo Concrete Forming Construction Ltd. (Respondent) (*Withdrawn*)

**0900-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Dinacon Construction Ltd. (Respondent) (*Granted*)

**0908-90-G:** Drywall, Acoustic, Lathing & Insulation, Local 675 (Applicant) v. Alstate Drywall Systems Ltd. (Respondent) (*Withdrawn*)

**0942-90-G:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. San Remo Contractors Ltd. (Respondent) (*Withdrawn*)

**0966-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Dennison Carpentry (Respondent) (*Withdrawn*)

**0976-90-G:** Labourers' International Union of North America, Local 625 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Smith Brothers Excavating Ltd. (Respondent) (*Withdrawn*)

**1001-90-G:** International Union of Operating Engineers, Local 793 (Applicant) v. R & R Crane & Equipment Rental Inc. (Respondent) (*Withdrawn*)

**1002-90-G:** International Union of Operating Engineers, Local 793 (Applicant) v. C & P Lafontaine Excavating Ltd. (Respondent) (*Granted*)

**1012-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Cancian Brothers Ltd. (Respondent) (*Withdrawn*)

**1018-90-G:** Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. W.A.K. Masonry (Respondent) (*Withdrawn*)

**1020-90-G:** Labourers' International Union of North America, Local 607 (Applicant) v. Brown & Root Ltd. (Respondent) (*Withdrawn*)

**1029-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. B & W. Contracting (Respondent) (*Withdrawn*)

**1031-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Dineen Construction Ltd. (Respondent) (*Withdrawn*)



**1048-90-G:** Labourers' International Union of North America, Local 493 (Applicant) v. R. M. Belanger Const. Ltd. (Respondent) (*Withdrawn*)

**1049-90-G:** Labourers' International Union of North America, Local 183 (Applicant) v. 841328 Ontario Ltd., c.o.b. New West Carpentry (Respondent) (*Withdrawn*)

**1050-90-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Residential Framing Contractors' Association of Metropolitan Toronto & Vicinity Inc. and J. Schmidt Carpentry Ltd. (Respondents) (*Withdrawn*)

**1053-90-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Labour Relations Bureau of the Ontario General Contractors Association and Finley W. McLachlan Const. Co. (Respondent) (*Granted*)

**1056-90-G:** International Brotherhood of Painters & Allied Trades, Local 200 (Applicant) v. Marathon Glass & Caulking Ltd. (Respondent) (*Withdrawn*)

**1078-90-G:** International Union of Elevator Constructors, Local 90 (Applicant) v. Montgomery-Kone Elevator Company Ltd. (Respondent) (*Withdrawn*)

**1087-90-G; 1115-90-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Dinacon Construction Co. Ltd. (Respondent) (*Granted*)

**1107-90-G:** Labourers' International Union of North America, Local 247 (Applicant) v. Cornwall Gravel Company Ltd. (Respondent) (*Withdrawn*)

**1110-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. St. Thomas Acoustics & Drywall Inc. (Respondent) (*Granted*)

**1155-90-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Salvador Excavating Ltd. and Salvador Kastoryano (Respondents) (*Granted*)

**1157-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Seila General Contracting Ltd. (Respondent) (*Withdrawn*)

**1158-90-G:** Sheet Metal Workers' International Association, Local 562 (Applicant) v. Walden Roofing & Sheet Metal Company Ltd. (Respondent) (*Withdrawn*)

**1167-90-G; 1235-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Cancian Brothers Ltd. (Respondent) (*Granted*)

**1168-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Eton Construction (Respondent) (*Withdrawn*)

**1172-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. R & L Construction and Rocco Larizza Construction (Respondents) (*Withdrawn*)

**1187-90-G:** The Ontario Allied Construction Trades Council (Applicant) v. The Electrical Power Systems Construction Association (Respondent) (*Withdrawn*)

**1202-90-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Canron Inc. (Respondent) (*Withdrawn*)

**1205-90-G:** International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. James Richardson c.o.b. as Hi-Lo Insulating (Respondent) (*Granted*)

**1212-90-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Bay Forming Inc. (Respondent) (*Withdrawn*)

**1280-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 1988 (Applicant) v. Nation Dry-wall Cont. Ltd. (Respondent) (*Granted*)

## APPLICATIONS FOR RECONSIDERATION OF BOARD DECISION

**1542-84-U:** Reuben Johnson (Complainant) v. United Electrical, Radio & Machine Workers of Canada (UE) (Travailleurs Unis de l'Electricite, Radio et Machinerie du Canada (TUE) (Respondent) (*Dismissed*)

**2088-88-G:** International Brotherhood of Electrical Workers, Local 894 (Applicant) v. Commercial Contracting Corporation of Canada, Ltd. (Respondent) (*Dismissed*)

**2299-89-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Norman A. Faucher Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener) (*Withdrawn*).

## APPLICATIONS FOR ACCREDITATION

**1533-88-R** Metropolitan Toronto Sewer and Watermain Contractors Association (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Ontario Concrete and Drain Contractors Association (Intervener #1) v. Labourers International Union of North America, Local 183 (Intervener #2) v. Teamsters' Local Union 230 (Intervener #3) v. Metropolitan Toronto Road Builders Association (Intervener #4) v. Canadian Automatic Sprinkler Association (Intervener #5) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Intervener #6) v. The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Intervener #7) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853 (Intervener #8) v. Metropolitan Toronto Apartment Builders Association (Intervener #9) v. Toronto Construction Association, General Contractors Section (Intervener #10) v. Sarnia Construction Association (Intervener #11) v. Construction Association of Thunder Bay (Intervener #12) v. Sudbury Construction Association (Intervener #13) v. Electrical Power Systems Construction Association (Intervener #14)

**1534-88-R:** Metropolitan Toronto Sewer and Watermain Contractors Association (Applicant) v. Teamsters' Local Union 230 and a Council of Trade Unions acting as the representative and agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local Union 183 (Respondents) v. Ontario Concrete and Drain Contractors Association (Intervener #1) v. Labourers International Union of North America, Local 183 (Intervener #2) v. International Union of Operating Engineers, Local 793 (Intervener #3) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Intervener #4) v. The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Intervener #5) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853 (Intervener #6) v. Metropolitan Toronto Apartment Builders Association (Intervener #7) v. Toronto Construction Association, General Contractors Section (Intervener #8) v. Sarnia Construction Association (Intervener #9) v. Construction Association of Thunder Bay (Intervener #10) v. Sudbury Construction Association (Intervener #11) v. Electrical Power Systems Construction Association (Intervener #12)

**1535-88-R:** Metropolitan Toronto Sewer and Watermain Contractors Association (Applicant) v. Labourers' International Union of North America Local Union 183 and a Council of Trade Unions acting as the representative and agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local Union 183 (Respondents) v. Ontario Concrete & Drain Contractors Association (Intervener #1) v. Ontario Precast Concrete Manufacturers' Association (Intervener #2) v. The Residential Low-Rise Forming

Contractors Association of Metropolitan Toronto and Vicinity (Intervener #3) v. Teamsters Local Union 230 (Intervener #4) v. International Union of Operating Engineers, Local 793 (Intervener #5) v. The Heavy Construction Association of Toronto (Intervener #6) v. Metropolitan Toronto Road Builders Association (Intervener #7) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Intervener #8) v. The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Intervener #9) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853 (Intervener #10) v. Canadian Automatic Sprinkler Association (Intervener #11) v. Metropolitan Toronto Apartment Builders Association (Intervener #12) v. Toronto Housing Labour Bureau (Intervener #13) v. Toronto Construction Association, General Contractors Section (Intervener #14) v. Sarnia Construction Association (Intervener #15) v. Sudbury Construction Association (Intervener #16) v. Construction Association of Thunder Bay (Intervener #17) v. Electrical Power Systems Construction Association (Intervener #18) (*Granted*)



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***Ontario Labour Relations Board,  
400 University Avenue,  
Toronto, Ontario  
M7A 1V4***









FEB 26 1992



